Supreme Court, U. S.
FILED
DEC 21 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. 78-1009

ECONOMY CARPETS MANUFACTURERS & DISTRIBUTORS, INC.,

Petitioner,

VS.

BETTER BUSINESS BUREAU OF BATON ROUGE AREA, INC. and ST. PAUL FIRE AND MARINE INSURANCE CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT

D. BERT GARRAWAY
1851 Plank Road
Baton Rouge, La. 70803
504/387-0358

BART EATON
911 N. Lobdell Blvd.
Suite C
Baton Rouge, La. 70806
504/927-8700

DAVID W. ROBERTSON
2500 Red River
Austin, Texas 78705
512/471-5151

November, 1978

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	3
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	5
How Federal Question is Presented	19
REASONS FOR GRANTING THE WRIT:	
I.	
The Gertz and New York Times Co. Decisions do not Support a First Amendment Privilege for Defamatory "Opinion" Statements	21
II.	
The Defamatory Statements Made of Plaintiff were Statements of Fact, Not Expressions of Opinion	31
III.	
The Court of Appeal Misunderstood and Misapplied the Federal Constitutional "Malice" Standard	40

IV.

Page

The Times-Gertz Privileges are confined to Defendants Who are Members of the Press or Other News Media. The Promulgation of a Pamphlet Does not Qualify the Better Business Bureau as a Member of the Press 47

V.

The Louisiana Courts' misapplication of Requirements of the Times-Gertz Series of Decisions, Mirroring Similar Confusion Elsewhere, Signals Serious Difficulties in the Lower Courts as to the Appropriate Scope of the First Amendment Strictures on Defamation Law 54

VI.

Plaintiff was denied Constitutional Rights to Due Process Through the Misapplication of this Court's Defamation Decisions 58

CONCLUSION 62

APPENDIX "A" - Opinion of the Court of Appeal 65

APPENDIX "B-1" - Trial Judge's Jury Charge 105

APPENDIX "B-2" - Judgment in Jury Trial 133

Page

APPENDIX "B-3" - Written Reasons for Judgment . . . 136

APPENDIX "B-4" - Judgment 158

APPENDIX "C" - Louisiana Supreme Court Order Refusing Review 160

APPENDIX "D" - Certificate of Court of Appeal That Case Was Decided on Basis of a Federal Question 161

TABLE OF AUTHORITIES

Page

Cases

Bates v. State Bar of Arizona, U.S. , 97 S.Ct. 2691 (1977) 51

Cosgrove Studio and Camera Shop, Inc. v. Pane, 408 Pa. 314, 182 A.2d 751 (1962) 35

Forrest v. Lynch, 347 So.2d 1255 (La.App.1st Cir.), writ refused 351 So.2d 168 (La. 1977), cert. denied 98 S.Ct. 1612 (U.S. 1978). 60

Francis v. Lake Charles American Press, 262 La. 875, 265 So.2d 206 (1972), appeal dism., 410 U.S. 901 (1973) 60

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) . 11, 12, 13, 14, 15, 20, 21, 24, 25, 26, 27, 28, 29, 36, 41, 47, 53, 54, 55, 56, 57, 58, 60

Guitar v. Westinghouse Electric Corp., 396 F.Supp. 1042 (S.D.N.Y. 1975) 37

In Re Testing Systems, Inc. v. Magnaflux Corp., 251 F.Supp. 286 (E.D. Pa. 1966) 38

Madison v. Bolton, 234 La. 997, 102 So.2d 433 (1958). 34, 60

Mashburn v. Collin, 355 So.2d 879 (La. 1977) . 14, 16, 17, 18, 19, 21, 24, 25, 26, 29, 30, 37, 41, 46, 54, 55, 60 61

Mayfair Farms, Inc. v. Socony Mobil Oil Co., 68 N.J. Super, 188, 172 A.2d 26 (1961) 37

Montgomery v. Dennison, 363 Pa. 255, 69 A.2d 520 (1949) 39

Naihaus v. Louisiana Weekly Publishing Co., 176 La. 239, 145 So. 527 (1932). 35

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) . 12, 14, 15, 22, 23, 24, 28, 29, 34, 40, 41, 42, 47, 54, 55, 60 61

Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309, 560 P.2d 1216 (1977). 35, 36, 37

Phoenix Newspapers, Inc. v. Church, 103 Ariz. 582, 447 P.2d 840 (1968), cert. denied 394 U.S. 959 (1969). . . 34

Rosenblatt v. Baer, 383 U.S. 75 (1965) 59, 61

Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). 13, 25, 26, 27, 28, 29, 54 55

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). 50

Miscellaneous

50 Am. Jur. 2d, Libel and Slander, Sec. 13 (1970). 35

Comment, "Translating Sympathy for Deceived Consumers Into Effective Programs for Protection," 114 U. Pennsylvania L.Rev. 395 (1966) 48

Developments in the Law, "Deceptive Advertising," 80 Harvard L.Rev. 1005 (1967) 48

T. Emerson, The System of Freedom of Expression 414 (1970). 50

A. Hanson, Libel and Related Torts, Sec. 28 (1969) 34

Keeton, "Defamation and Freedom of the Press," 54 Texas L.Rev. 1222 (1976) 30

Note, "Fair Comment," 62 Harvard L.Rev. 1207 (1949) . . . 37

Note, "First Amendment Protection Against Libel Actions: Distinguishing Media and Non-media Defendants," 47 So. Calif. L. Rev. 902 (1974) 49

Restatement (2d) of Torts Sec. 573 37

Robertson, "Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc." 54 Texas L.Rev. 199 (1976). . 40

Stewart, "The Free Press: The Great American Risk," Barrister, Spring 1975, p. 17 52

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO._____

ECONOMY CARPETS MANUFACTURERS & DISTRIBUTORS, INC.,

Petitioner,

VS.

BETTER BUSINESS BUREAU OF BATON ROUGE AREA, INC. and ST. PAUL FIRE AND MARINE INSURANCE CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT

The petitioner, Economy Carpets Manufacturers & Distributors, Inc., plaintiff below, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of Louisiana, First Circuit, reversing the decision of the trial court, 19th

Judicial District of Louisiana, which had entered judgment on a jury verdict for plaintiff. The court of appeal decision should be reversed on the issue of liability and the cause remanded to that court to consider petitioner's argument that the trial judge, while correctly determining that defendant was liable to plaintiff, erred in reducing the jury's award from One Million Dollars ($1,000,000.00) to Thirty Thousand Dollars ($30,000.00) on his review of the record alone.

OPINIONS BELOW

The opinion of the Court of Appeal for the First Circuit of Louisiana, reported at 361 So.2d 234 (La.App.1st Cir. 1978), appears as Appendix "A" to this petition. The district judge's charge to the jury, his judgment on the jury verdict, and his subsequent opinion on the issue of quantum--none of which are

reported--appear as Appendix "B" to this petition. The Louisiana Supreme Court's order denying review, as yet unreported, appears as Appendix "C" to this petition. The certificate of the Court of Appeal for the First Circuit of Louisiana, that its decision herein was based on a federal question appears as Appendix "D" to this petition.

JURISDICTION

The judgment of the Court of Appeal of Louisiana, First Circuit, was entered on July 10, 1978. A timely petition for writs of certiorari or review was denied by the Supreme Court of Louisiana on September 29, 1978, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction rests on 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether the decisions of this Court in New York Times Co. v. Sullivan

and Gertz v. Robert Welch, Inc. require that the author of a defamatory statement of opinion about a private person involved in a public matter be protected from liability unless the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not.

2. Whether a finding that defendant made a statement with knowledge that it was false or with reckless disregard of whether it was false is precluded by a finding that defendant lacked common-law "malice".

3. Whether the federal constitutional privileges against defamation liability created by Gertz v. Robert Welch, Inc. protect a defendant who is not a member of the press or other news media.

4. Whether reversal of a jury verdict in petitioner's favor premised on misapplication of the standards announced

in New York Times Co. v. Sullivan and Gertz v. Robert Welch, Inc. deprived petitioner of constitutional rights to the protection of reputation and of due process of law.

STATEMENT OF THE CASE

In 1969, Jesse Jarreau started a retail carpet business in Baton Rouge, Louisiana. This concern became a member of the Better Business Bureau of the Baton Rouge Area, Inc. (BBB). In 1973, it was destroyed by fire, lost its entire stock, and went into bankruptcy. Thereafter, Jarreau and his sister, Joyce Langlois, formed a new retail carpet business, Carpet Distributors, Inc. Mrs. Langlois was the sole owner. This concern did not become a BBB member. Disputes soon arose between Jarreau and BBB over BBB's publicizing that Carpet Distributors' predecessor business had gone bankrupt. Through its attorneys, Carpet Distributors requested BBB to cease promulgating

such information.

Meanwhile, Carpet Distributors bought and installed a carpet-making loom, and became Economy Carpets Manufacturers and Distributors, Inc. (Economy)(petitioner herein). Neither Carpet Distributors, Inc., nor Economy was a BBB member.

During the early months of 1974, BBB began questioning Economy's advertising. BBB wrote several inquisitorial letters to Economy, expressing doubt about some of Economy's advertising claims and requesting verification in the form of business records. The atmosphere between Economy and BBB was by this time one of mutual truculence. Economy did not respond to BBB's letters. In November, 1974, BBB complained to the state consumer protection agency and at the same time published a "Special Bulletin" about Economy. This "Bulletin", a two-page leaflet, is appended to the Louisiana

Court of Appeal opinion in Appendix "A" to this petition. It contained the following false and defamatory statements of and concerning plaintiff:

> "BBB QUESTIONS ECONOMY CARPETS' ADS .
>
> Bureau visits to Economy Carpets' . . . location thus far have revealed the presence of only one carpet loom in the warehouse at the rear of the premises. In addition, BBB shoppings conducted at the company's place of business . . . seem to indicate that the firm's salesmen showed little, if any, interest in selling carpeting which the company claimed to be manufacturing at that time. These facts combined raise serious questions concerning not only the accuracy of the company's advertising but also

the overall impression it creates . . . that is . . . locally made, mass-produced, low-priced carpets."

* * *

"A BBB staff member visited the company's place of business at approximately 9:30 a.m. on Monday, October 21, 1974 and was advised that all three of the [advertised] low-cost specials had been sold out between 8:30 and 9:30 a.m., the first day the sale began!!"

* * *

"CHILDISH

Do you remember the little boy who used to brag that his father was so strong he could beat up all the other fathers in the neighborhood?

Apparently, this little boy has grown to manhood and is now writing advertising claims that he undersells all other stores. Nobody has prices lower than his, whether it be for drugs, groceries, tires, carpeting or stereo equipment.

Childish? Yes. And it's regrettable that we have to see and hear so much advertising that has been condemned not only by all Better Business Bureaus but also by the Federal Trade Commission."

The Special Bulletin was widely disseminated. About 13,500 copies were distributed. While no copies were released to the media, the bulletin was widely circulated in the Baton Rouge area. Copies turned up in Dalton, Georgia, a carpet-making center.

In May, 1975, Economy filed suit against BBB and its insurer, St. Paul Fire and Marine Insurance Co., alleging conspiracy to restrain trade and defamation. The case and the underlying disputes between Economy and BBB became a cause celebre in the community. (See Economy Carpets Manufacturers and Distributors, Inc. v. Better Business Bureau, 319 So.2d 783 (La. 1976), setting aside trial judge's order restraining all parties from engaging in pre-trial publicity because the order was issued without notice or opportunity for hearing. See Economy Carpets Manufacturers and Distributors, Inc. v. Better Business Bureau, 330 So.2d 301 (La. 1976), setting aside trial judge's later order against pre-trial publicity on First Amendment grounds. See Economy Carpets Manufacturers and Distributors, Inc. v. Better Business Bureau, 333 So.2d 765

(La. App. 1st Cir.), writs refused 334 So.2d 428 (La. 1976), reversing trial judge's order dismissing as a party defendant a Baton Rouge law firm that had worked with BBB.

At the conclusion of the five-day trial, the jury found against plaintiff on the restraint of trade count and awarded One Million Dollars ($1,000,000) in defamation damages. On the defamation count, the jury were properly instructed by the trial judge according to the requirements laid down for defamation suits by private plaintiffs in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); the trial judge told the jury that plaintiff must prove defamatory content, publication, falsity, fault, and actual injury. (Jury Charge at pp. 7, 9-10, Appendix "B" to this petition.)

On February 4, 1977, the trial judge entered judgment on the verdict for

plaintiff. Thereafter, he granted defendants' motions for a new trial on the issue of damages. By stipulation, the trial judge considered this matter on the record alone. Without specifying in what particulars the jury might have misunderstood the instructions given at the first trial, and without finding that the jury award was supported by no evidence or was against the great weight of the evidence, the trial judge reduced the award to Thirty Thousand Dollars ($30,000.00). The trial judge's opinion on the damages issue (Appendix "B" to this petition) apparently held plaintiff to the "special damages" requirements that had sometimes been required of plaintiffs in slander cases, rather than to the "actual injury" standard laid down in Gertz.

All parties appealed to the Louisiana Court of Appeal for the First Circuit. Plaintiff urged that the trial

judge had erred in granting a new trial on the issue of damages, the jury having been properly instructed under the Gertz requirements, and that the award of One Million Dollars ($1,000,000.00) should be reinstated as having been proved under Louisiana law as modified by Gertz. Without reaching that point, the court of appeal reversed and rendered judgment for defendants.

The court of appeal's sole basis for rendering judgment for defendants was an interpretation of the decisions of this Court in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). Under that interpretation of the Times and Gertz cases, plaintiff could not recover for defamation without proving that defendant's statements were made with knowledge of falsity or reckless disregard of their truth or falsity. This

requirement was not imposed on the view that plaintiff was a "public official" or "public figure". Nor was it imposed on the view that Louisiana courts adhere to the pre-Gertz standard announced in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), whereby any plaintiff defamed in a media statement on a matter of public or general concern was required to prove knowledge of falsity or reckless disregard of truth or falsity. Instead, the crucial interpretation of Times and Gertz was that

> "[a] defendant in a defamation suit, who is expressing an opinion as opposed to making a statement of fact, is entitled to a 'fair comment privilege. * * * 'We conclude . . . that the First Amendment freedoms as defined by the New York Times-Gertz series of decisions

> afford[s] [sic], at the very least, a defense against defamation actions for expressions of opinion about matters of public concern made without knowing or reckless falsity.'" (361 So.2d at 239-240). Emphasis added. Appendix "A" to this petition.)

The court of appeal took its view of the Times and Gertz decisions from the Louisiana Supreme Court. In Mashburn v. Collin, 355 So.2d 879 (La. 1977), that court has held privileged under the First (Fourteenth) Amendment a food critic's newspaper column criticizing a particular restaurant, on the view that

> "the New York Times-Gertz series of decisions affords, at the very least, a defense against defamation actions for expression of opinion about matters of public concern made without knowing or

reckless falsity. * * * The contours of the New York Times-Gertz privilege regarding expressions of opinion are uncertain but we think that it clearly protects at least (1) mere expressions of opinion; (2) by members of the press or the news media; (3) concerning matters of public interest or concern; (4) when made without knowing or reckless falsity." 355 So.2d at 885.

The Louisiana Supreme Court made clear that it was reaching this decision solely on the basis of federal First Amendment law, and not state law.

"[I]t is desirable that we state clearly some of the issues which have not been decided. * * * Because an expression of opinion without knowing or reckless

falsity about a matter of public concern by the press is fully protected under the First Amendment aegis, we did not consider to what extent our state constitution, jurisprudence, and statutes also protect expressions of such opinions. Nor did we attempt to define the ambit of Louisiana's safeguard for defamatory misstatements of fact."
355 So.2d at 891.

The Louisiana Court of Appeal for the First Circuit in the instant case relied only on Mashburn, and hence only on federal law, in support of its decision:

"Mashburn requires the following inquiries: (1) Does the Special Bulletin constitute opinion; (2) Does it contain any misstatement of fact;

(3) Was any expression of opinion in the bulletin made with knowing falsity or reckless disregard of the truth or falsity thereof; and (4) Is the subject matter of the bulletin a matter of public concern." 361 So.2d at 239-40. Appendix "A" to this petition.

* * *

"Mashburn establishes the following test to determine the difference between statements of fact and opinion: [whether ordinary persons would understand the utterance, taken as a whole, as fact or opinion.] Employing the foregoing guidelines we find that much of the tex of the Special Bulletin, as

well as the impressions and implications which may be drawn therefrom, constitutes opinion." Id. at 240.

* * *

"Applying the principles of Mashburn to the case at hand, we find the Special Bulletin in question privileged as 'fair comment' and that Economy's claim for damages for defamation must be rejected." Id. at 242.

Having concluded that the BBB "Special Bulletin" consisted of statements of opinion, rather than fact, the court of appeal determined that plaintiffs could not prove knowledge of falsity or reckless disregard of the truth. The court did not in fact address that issue at all, but, as explained more fully in Point III of

this petition, instead ventured only a cursory inquiry into the presence of common-law "malice".

Petitioner timely sought writs of certiorari from the Louisiana Supreme Court, urging that the court of appeal had erred in construing the Special Bulletin as statements of opinion, rather than fact; that the court of appeal had erroneously overlooked the Mashburn requirement (for the invocation of the "opinion" privilege) that defendant be a member of the press or other news media; and that the court of appeal had wholly misunderstood and misapplied the "knowing or reckless falsity" requirement. Writs were refused with the notation "[t]he result is correct." (Appendix "C")

How Federal Question is Presented

The original judgment in plaintiff's favor was entered on a verdict rendered

by a jury correctly instructed under the requirements laid down for defamation actions brought by private plaintiffs in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). Thereafter, the trial judge granted a new trial on the issue of damages and reduced them radically, apparently going on a misapplication of the Gertz actual injury requirement. Without reaching petitioner's argument on that point, the Court of Appeal for the First Circuit of Louisiana rendered judgment for defendants on the basis of an "opinion privilege gleaned from decisions of this Court rendered under the First Amendment to the United States Constitution. Petitioner sought a writ of review from the Louisiana Supreme Court, which was denied.

Thus, this defamation case turned solely on federal issues at each stage in the state courts. The trial judge

first applied, then misapplied Gertz. The court of appeal misinterpreted and misapplied an "opinion privilege" gleaned from New York Times and Gertz, and wholly misunderstood the Times-Gertz "knowledge of falsity or reckless disregard of truth or falsity" standard.

REASONS FOR GRANTING THE WRIT

I.

THE GERTZ AND NEW YORK TIMES CO. DECISIONS DO NOT SUPPORT A FIRST AMENDMENT PRIVILEGE FOR DEFAMATORY "OPINION" STATEMENTS.

The court of appeal in the instant case relied solely on Mashburn v. Collin, 355 So.2d 879 (La. 1977), in which the Louisiana Supreme Court had read Gertz and New York Times to create a federal-law First (Fourteenth) Amendment privilege for statements of opinion by members of the press or news media on matters of public concern. The

decisions of this Court do not support such a privilege. The Louisiana Supreme Court relied upon language in New York Times Co. v. Sullivan, 376 U.S. 254, 292 n. 30 (1964) to this effect:

> "Since the Fourteenth Amendment [making the First applicable to the states] requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact." (Quoted at 355 So.2d at 884.)

The Louisiana Supreme Court read this expression to mean that all honest statements of opinion about matters of public concern are privileged. But the

quoted language was not intended to convey that meaning, and will not bear it. The very next sentence of the Times opinion, not quoted or referred to by the Louisiana Supreme Court, stated:

> "Both defenses are of course defeasible if the public official proves actual malice, as was not done here." 376 U.S. at 292, n. 30.

What the Times Court meant was plain: Neither statements of fact nor statements of opinion about public officials are actionable unless the fact stated or taken as the basis of the opinion stated was held with "actual malice," i.e., "with knowledge that it was false or with reckless disregard of whether it was false or not." (376 U.S. at 279-80) In the instant context, by hypothesis nothing in the federal constitution would protect statements of fact made by

the BBB about plaintiff, a private business; therefore, there is nothing in New York Times that would protect a BBB statement of opinion about that business either.

The Mashburn decision also relied upon language from Gertz v. Robert Welch, Inc., 418 U.S.323, 339-40 (1974):

> "We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." (Quoted at 355 So.2d at 884)

The Louisiana Supreme Court took the

quoted language to mean that "mere comment or opinion on public matters, even though defamatory" is not actionable, at least when uttered by members of the press or news media, unless stated with "knowing or reckless falsity". (355 So.2d at 884, 885). That interpretation has the Gertz majority clinging to the rule of Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), as the test for defamation liability for statements of opinion. The entire thrust of the Gertz decision, of course, was precisely to the contrary: Gertz repudiated the Rosenbloom "matter of public or general concern" test as an unworkable constitutional standard. Under Gertz, public official and public figure defamation plaintiffs are required to prove "knowing or reckless falsity", but private plaintiffs--at stake in Mashburn, as in the instant case--are not. The Gertz Court could not have

meant to cling to Rosenbloom as the test for defamation actions brought by private persons defamed by statements of opinion about public matters. Gertz aimed at reducing the number of unworkable distinctions, not increasing that number.

The Louisiana Supreme Court in Mashburn could, if it chose, have decided to adhere to the Rosenbloom test, as some state courts have done. It could even, though this would have contributed to the already troublesome proliferation of difficult distinctions, have decided to adhere to a limited version of Rosenbloom, confined to opinion statements about private persons involved in matters of public concern. But the Louisiana Supreme Court emphatically did not mean to do either of those things:

> "[I]t is desirable that we state clearly some of the

issues which have not been decided [in this case]. * * * Because an expression of opinion without knowing or reckless falsity about a matter of public concern by the press is fully protected under the First Amendment aegis, we did not consider to what extent our state constitution, jurisprudence and statutes also protect expression of such opinion. Nor did we attempt to define the ambit of Louisiana's safeguard for defamatory misstatements of fact. Since . . . Gertz many states have applied its negligence standard . . . while some have followed the Rosenbloom rationale . . . It is clear that a state is free to adopt any

reasonable standard, so long as it affords the minimum protection required by the New York Times-Gertz cases. In the instant case it was not necessary for us to define such a standard for Louisiana . . ." 355 So.2d at 891-92.

When the Louisiana Supreme Court mistakenly concludes that New York Times and Gertz impose a federal requirement that a private plaintiff, defamed by an opinion statement concerning a matter of public interest, prove knowledge of falsity or reckless disregard of the truth, it has not taken the constitutionally defensible step of determining to follow or to continue to follow a truncated version of Rosenbloom. Instead, it has adopted a mistaken notion of what the decisions of this Court mean, and in so

doing, has promoted a standard that is even more unworkable and impossible of even-handed application than Rosenbloom had proved to be. Neither New York Times nor Gertz affords the slightest support for the "opinion privilege" concocted as a matter of federal First Amendment law by the Mashburn court and applied by the court of appeal in the instant case as the basis for denying plaintiff's recovery. No discernible basis for distinguishing fact from opinion emerged in either the Mashburn case or the court of appeal decision in the instant case. Nor does the distinction seem capable of elucidation or application. Quite aside from the difficulties of distinguishing fact from opinion, another awesome array of difficulties are conjured up by the question, how can an opinion, as opposed to a statement of fact, be shown to be false, much less to be known by the

utterer to be false? See Keeton, "Defamation and Freedom of the Press", 54 Texas L.Rev. 1222, 1233-35, 1241-45, 1249-51, 1254 (1976). That both these questions defied analysis in the instant case is shown by the fact that the court of appeal, though it was able correctly to paraphrase the Mashburn test as whether "any expression of opinion in the bulletin [was] with knowing falsity or reckless disregard of the truth or falsity thereof", (361 So.2d at 240, Appendix "A") was evidently unable to conceive of applying it; the court stated the issue in the instant case to be:

> "Whether the bulletin contained misstatements of fact and whether such misstatements were made with knowing falsity or with reckless disregard as to the truth or falsity thereof . . ."

(Id.; emphasis added.)

II.

THE DEFAMATORY STATEMENTS MADE OF PLAINTIFF WERE STATEMENTS OF FACT, NOT EXPRESSIONS OF OPINION.

The most damaging BBB statements about plaintiff were the following:

> "[There are] serious questions concerning not only the accuracy of [plaintiff's] advertising but also the overall impression it creates . . . that is . . . locally made, mass-produced, low-priced carpets.
>
> * * *
>
> "CHILDISH. Do you remember the little boy who used to brag that his father was so strong he could beat up all the other fathers in the neighborhood?
>
> Apparently, this little boy has grown to manhood and is now writing advertising claims

> that he undersells all other stores. * * *
>
> Childish? Yes. And it's regrettable that we have to see and hear so much advertising that has been condemned not only by all Better Business Bureaus but also by the Federal Trade Commission." (BBB "Special Bulletin", appended to court of appeal opinion, Appendix "A" to this petition.)

It is difficult to understand how any analysis could characterize those statements as expressions of the writer's opinion, as opposed to purported statements of fact. The only intelligible reason* ventured by the court of appeal

*The other reasons advanced by the court of appeal for the "opinion" characterization were evident makeweights. The court stated that the Special Bulletin must have been a statement of opinion because it said the

for characterizing the statements as "opinion" was:

> "[T]he publication states: 'These facts combined raise serious questions . . .' The language is labeled as opinion in that it is said to be the subject of some 'question' or doubt by the BBB." (361 So.2d at 241-42. Appendix "A" to this petition.)

Plainly the court of appeal looked only to form and not at all to substance. The jurisprudence and commentary on the fact/opinion distinction--most of it concerned with the common-law "fair comment" privilege that was a precursor

matters charged had been referred to the state's consumer protection agency for investigation, and that the BBB's purpose is always to "provide information, express an opinion on the information developed, advise the public as to protective measures," and then let the public make up its own mind. 361 So.2d at 241; Appendix "A" hereto.

to the New York Times decision--shows mostly that the distinction is wholly unworkable. But it does emerge with complete clarity that formal equivocation is unimportant:

> "A defamatory idea communicated indirectly is still actionable. Putting the statement in the form of a question or prefacing it with 'I think' or other expressions of opinion . . . does not prevent a defamatory statement from being actionable." A. Hanson, Libel and Related Torts, Sec. 28 (1969). (To precisely the same effect see, e.g., Madison v. Bolton, 234 La. 997, 102 So.2d 433, 437-38 (1958); Phoenix Newspapers, Inc. v. Church, 103 Ariz. 582, 447 P.2d 840, 846, (1968), cert. denied

394 U.S. 959 (1969); 50 Am. Jur. 2d Libel and Slander, Sec. 13 (1970).)

A number of decisions in Louisiana and elsewhere have imposed defamation liability for oblique or indirect criticism of businesses without pausing at all over the fact that the criticism may have been couched in opinion form. (See, e.g., Naihaus v. Louisiana Weekly Publishing Co., 176 La. 239, 145 So. 527 (1932); Cosgrove Studio and Camera Shop, Inc. v. Pane, 408 Pa. 314, 182 A.2d 751 (1962).) One such recent decision is on all fours with the instant case. In Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309, 560 P.2d 1216, 1218-19 (1977), defendant newspaper libelled plaintiff by repeating Better Business Bureau claims that plaintiff was "charged" with "highly questionable sales methods" and was guilty of "frequent apparent

transgressions;" that the BBB was "planning to bear down" on plaintiff; that "[a]though [we] can't prove it, [plaintiff's advertising] appears to be based on bait and switch." In form, all these charges were couched as equivocation, and the instant court of appeal would presumably have characterized them as statements of opinion. Yet the "opinion" or "fair comment" point did not even come up in Peagler. The Arizona Supreme Court held that liability could be imposed on a finding of negligence under the requirements set forth for defamation suits by private plaintiffs in Gertz, stating that "[t]he article impeached [plaintiff's] integrity and reputation . . . by referring to the 'firm's frequent apparent transgressions' and 'business firms which engaged in highly questionable sales methods.' * * * This article was clearly libelous

per se." 560 P.2d at 1223. The BBB's charges against plaintiff were virtually identical to those labelled libel per se in Peagler. They are charges of the sort made slander per se by the blackletter law. (Restatement (2d) of Torts Sec. 573.) The formal equivocation, if any indeed actually appears in the BBB "Special Bulletin," is wholly irrelevant. Mashburn's characterization of a food critic's newspaper column evaluating the quality of a restaurant's food and service as opinion, while plausible, has nothing to do with the instant case. (See, supporting characterizing the statements of food and literary critics and the like as opinion, Mayfair Farms, Inc. v. Socony Mobil Oil Co., 68 N.J. Super. 188, 172 A.2d 26, 28 (1961); Guitar v. Westinghouse Electric Corp., 396 F.Supp. 1042, 1048 (S.D.N.Y. 1975); Note, "Fair Comment", 62 Harvard L.Rev.

1207, 1213 (1949).) The BBB was not stating a subjective evaluation of plaintiff's business practices. It was not venturing its own opinion, offering it as such for whatever it might have been worth. Instead, with the weight and authority of great prestige and reputation for objectivity, the BBB charged plaintiff with deceptive and fraudulent advertising practices, of the sort that have "been condemned not only by all Better Business Bureaus but also by the Federal Trade Commission". Courts have often recognized that, in assessing whether defamatory matter is actionable, the alleged impartiality and objectivity with which defendant has purported to promulgate his views is a crucial consideration. See, e.g., In Re Testing Systems, Inc. v. Magnaflux Corp., 251 F.Supp.286, 289 (E.D. Pa. 1966). In another case of actionable libel by the Better Business

Bureau, one court stated:

> "That the defendant . . . is engaged in the commendable business of protecting the public . . . gives him no immunity to recklessly stigmatize unoffending citizens . . . That [the BBB official] was apparently acting in behalf of the Better Business Bureau . . . does not lessen [the] offense. Rather, it aggravates it. [It] added weight to the publication of the accusation. * * * Any individual's reputation for integrity is his greatest asset. He who attempts to destroy that reputation is doing something which meets with the condemnation of the law and of all persons who believe in fair dealing between man and man." Montgomery v. Dennison,

363 Pa. 255, 69 A.2d 520, 527-28 (1949).

III.

THE COURT OF APPEAL MISUNDERSTOOD AND MISAPPLIED THE FEDERAL CONSTITUTIONAL "MALICE" STANDARD.

In New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964), this Court stated that a statement is made with "actual malice" when it is made "with knowledge that it was false or with reckless disregard of whether it was false or not." The "actual malice" shorthand has caused serious difficulties in the lower courts because it invites confusion with common-law "malice", an entirely different concept. See Robertson, "Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.," 54 Texas L.Rev. 199, 235-36 (1976). The more recent decisions of this Court have tended to a full articulation of the "with knowledge that it was false or with reckless disregard of whether it

was false or not" standard, rather than to the "actual malice" shorthand. The Louisiana Supreme Court in Mashburn used the formulation "knowing or reckless falsity".

Nevertheless, the court of appeal in the instant case was confused by the malice" term. The court of appeal correctly paraphrased the Mashburn "opinion privilege" (gleaned from Times and Gertz) as requiring inquiry whether the defamatory statements were "malicious, meaning were they knowingly false or made with reckless disregard as to their truth or falsity". (361 So.2d at 241. Appendix "A" to this petition.) But the court made no attempt to apply that standard. Instead, the only issue discussed was whether "the bulletin was not published to question or challenge Economy's business practices, but was intended to drive Economy out of business because

Economy was not a BBB member." Id. The issue thus addressed was, of course, not New York Times "malice", but common-law "malice".

Had the court seriously confronted the question whether the BBB utterances were made with "knowing or reckless falsity", rather than contenting itself with a cursory look at the possibility of common-law "malice", the following matters would have supported a conclusion that plaintiffs met that standard. As shown in plaintiff's brief to the court of appeal:

(1) Whereas the BBB Special Bulletin indicated plaintiff lacked the capacity to manufacture a significant amount of carpeting, the testimony of BBB officials revealed that they had seen raw material for carpeting on plaintiff's premises and had observed plaintiff's carpet loom in operation. (Tr. pp. 428,

876*.) These BBB officials had also been told by a state official and by a letter from another that plaintiff did in fact manufacture carpet. (V. I of II, p. 115; V. II of II, p. 306.) One witness testified that the loom had a 2000-square-yard-per-day capacity. (Tr. p. 166.)

(2) Whereas the BBB Special Bulletin stressed in an insinuating manner that plaintiff had been the "subject of a number of consumer complaints", the evidence showed that a BBB official had suggested to certain individuals that they file complaints against plaintiff; and there was testimony on behalf of the BBB that, while there were five complaints on file against plaintiff, a company might have as many as thirty complaints a year and

*The transcript page references are based on the separate work of two court reporters. D. L. Martin reported two volumes, pp. 1-327. These volumes are referred to herein as "V. I of II, V. II of II." Joyce Edwards reported six volumes, pp. 1-1027. These volumes are referred to herein as "Tr."

still have a "good file" with the BBB. (V. II of II, pp. 249-54; Tr. pp. 783, 290.)

(3) Whereas the Special Bulletin stated that a BBB staff member had visited plaintiff's premises on the day of an advertised sale and "was advised that all three of the low-cost specials had been sold out between 8:30 and 9:30 a.m., the first day the sale began!!"--thus in wording and punctuation implying that plaintiff's salesmen were diverting customers from the advertised goods toward other goods and that the advertised special had been a lie--the record showed that the staff member did not consult any of plaintiff's salesmen on the occasion in question, but only a customer already known to him, and the BBB officer acknowledged the items might well have been gone by that time. This was the same staff member who co-authored the Special Bulletin. (Tr. pp. 646, 649-50, 445.)

The following additional facts were adduced at trial:

(4) Of the thirty-one (31) carpet dealers in Baton Rouge, only plaintiff and one other firm were not members of the BBB. (Tr. p. 393.)

(5) Plaintiff's advertising was "substantially similar" to that of BBB members. (Tr. pp. 225, 441.)

(6) The BBB had never before published a "Special Bulletin" directed at only one firm. (Tr. p. 299.)

(7) The BBB received a complaint from one of plaintiff's competitors who was a BBB member. (Tr. p. 215.)

(8) Other than requesting information in the form of business records from plaintiff, the BBB took no steps to learn about carpet manufacturing. (Tr. pp. 429, 430, 444, 448-49.)

(9) One staff member of the BBB actively attempted to recruit complaints. (V. II

of II, pp. 249, 252-54.)

(10) The "Special Bulletin" was prominently displayed by BBB members who were direct competitors of plaintiff. (V. I of II, p. 20.)

(11) The "Special Bulletin" was published after the BBB had been warned by its own attorney of the consequences of its falsity. (Tr. pp. 285, 260, 901.)

Even under the test articulated by the Louisiana Supreme Court in Mashburn, plaintiff is entitled to a recovery on a showing of "knowing or reckless falsity." At the least, petitioners are entitled to careful consideration of the application of the "knowing or reckless falsity" standard to the BBB Special Bulletin. The court of appeal here made no inquiry whatsoever into whether the elements of that standard were met by plaintiff's proof, confining itself to a cursory inquiry into the presence of "common-law

malice", i.e., ill will, spite, or illegitimate motive.

IV.

THE TIMES-GERTZ PRIVILEGES ARE CONFINED TO DEFENDANTS WHO ARE MEMBERS OF THE PRESS OR OTHER NEWS MEDIA. THE PROMULGATION OF A PAMPHLET DOES NOT QUALIFY THE BETTER BUSINESS BUREAU AS A MEMBER OF THE PRESS.

Acknowledging the continuing controversy over whether the Gertz decision was intended to be restricted to defamation by the press and broadcast media, the Louisiana Supreme Court in Mashburn limited its application of the "New York Times-Gertz [opinion] privilege [to] mere expressions of opinion by members of the press or the news media." (355 So.2d at 885.) The court of appeal in the instant case wholly ignored that limitation.

Perhaps the court of appeal was influenced by its laudatory view of the BBB, which is described in the opinion in flattering terms that largely paraphrase the BBB charter. (361 So.2d at 236-37);

Appendix "A" hereto.) But the publication of "bulletins" and a self-projected image as "essentially a consumer information service" do not make the BBB a member of the press or news media. The Better Business Bureau was founded as "an independent agency of Business", designed as a "vigilance committee" with the dual purposes of "forestall[ing] the future intrusion of government in [business's] affairs" and of generating public confidence in business by emphasizing that "the poor ethics of the few do not represent the policies and practices of all advertisers". (Developments in the Law, "Deceptive Advertising", 80 Harvard L. Rev. 1005, 1157 (1967); Comment, "Translating Sympathy for Deceived Consumers into Effective Programs for Protection", 114 U. Pennsylvania L.Rev. 395, 404 (1966).) Its publications are more analogous to pamphlets, handbills, or

trade publications than to news. Factors supporting treating such publications differently from media utterance include: (1) their reliance on internal, rather than market, funding, which means there is no market pressure to encourage reliability; (2) their infrequent or one-time appearance, which means there is no motive to be reliable in order to secure the medium's continued existence, and no ready medium of reply; (3) in the case of trade publications, "their commercial relationship to the subject matter of publication, [which] may be such that the common-law standards better reconcile the needs of reputation and speech" than First Amendment privileges. (See Note, "First Amendment Protection Against Libel Actions: Distinguishing Media and Non-media Defendants", 47 So. Calif. L.Rev. 902, 937-38, nn. 191, 193 (1974).)

Discussing the cognate matter of "commercial speech", Professor Emerson wrote: "Roughly, . . . the 'commercial sector' embraces the production and exchange of goods and services for profit, as distinguished from the production or exchange of ideas on political, religious, artistic and similar matters". (T. Emerson, The System of Freedom of Expression, 414-15 (1970).) Under recent decisions of this Court, "commercial speech" is no longer wholly outside the protection of the First Amendment, but enjoys "second class First Amendment rights". (Rehnquist, J., Dissenting in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 786 (1976).) But false commercial speech is not protected by the First Amendment because:

> "[T]he public and private benefits from commercial speech derive from confidence in its

accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena." Bates v. State Bar of Arizona, _____U.S._____, 97 S.Ct. 2691, 2709 (1977).

It is not necessary to classify the BBB utterance at stake in the instant case as "commercial speech" in order to answer the question whether the BBB should enjoy a privilege intended to be confined to members of the press or news media. According to views published by Mr. Justice Stewart several months after the decision in Gertz, this Court's defamation decisions are best explained on the premise that the First Amendment's freedom of the press guarantee is broader than the guarantee of freedom of expression.

"[T]he free press guarantee is

. . . a structural provision of the Constitution. * * * The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the government as an additional check on the other three branches. * * * [The press guarantee ordains] the Fourth Estate. * * * [The Court's privilege against liability for libel] aims to insure bold and vigorous prosecution of the public's business. * * * By contrast, the Court has never suggested that the constitutional right of free speech gives an individual any immunity from liability for either libel or slander." P. Stewart, "The Free Press: The Great

American risk", Yale Law School Sesquicentennial Convocation, Nov. 2, 1974, reprinted in Barrister, Spring 1975, at 17, 18, and excerpted as "Or Of the Press", 26 Hastings L.J. 631 (1975).

In the instant case the jury were charged that plaintiff had the burden of proving fault, defined as negligence, falsity, and actual injury. (Jury charge at 7, 8, 9, Appendix "B" to this petition.) The jury found that plaintiff had proved that the Bulletin was false, that the BBB was negligent in uttering it, and that plaintiff suffered actual injury from the defamation. In the context of defamation of a private plaintiff, even by a media defendant, and even on a matter of public concern, that is all the Gertz decision mandates. When it is considered that the BBB is not a

member of the press or news media, and that the utterance involved here was, broadly speaking, of the "commercial sector", what justification can be found in the purposes of the First Amendment or elsewhere for affording defendant more protection than Gertz (or even Mashburn) requires?

V.

THE LOUISIANA COURTS' MISAPPLICATION OF REQUIREMENTS OF THE TIMES-GERTZ SERIES OF DECISIONS, MIRRORING SIMILAR CONFUSION ELSEWHERE, SIGNALS SERIOUS DIFFICULTIES IN THE LOWER COURTS AS TO THE APPROPRIATE SCOPE OF THE FIRST AMENDMENT STRICTURES ON DEFAMATION LAW.

The Louisiana Supreme Court in Mashburn found an "opinion privilege" in the Times and Gertz decisions that is in fact not to be found in those cases. The Louisiana court read Gertz as having reiterated and clung to Rosenbloom for the limited matter of opinion statements by media of private plaintiffs, whereas the plain intention of Gertz was to

repudiate the Rosenbloom standard as unworkable. While state courts are free to cling to all or part of Rosenbloom if they wish to do so as a matter of interpreting their own view of the appropriate protection for freedom of the press, the Louisiana Supreme Court expressly stated that was not its intention. Hence the Louisiana Court has simply misunderstood and misapplied the Gertz case.

The privilege found in Gertz and Times by the Mashburn court was, however, expressly limited by the Mashburn court to defamatory statements by members of the press or other news media. This limitation, in and of itself, is consistent with the letter and spirit of Gertz. The Court of appeal in the instant case, however, paid no attention at all to that requirement.

The Mashburn court stated that plaintiff could recover for a defamatory

opinion utterance by a member of the media on proving "knowing or reckless falsity". The court of appeal in the instant case made no effort to discern whether the record would support the elements of that standard, instead confining itself to a cursory inquiry into the presence of common law "malice".

All of these mistakes are serious ones. It would be one thing for the state courts to work out their own (albeit somewhat baroque) scheme for defamation liability. It is quite another when those courts mistakenly assume they are carrying out the dictates of the First (Fourteenth) Amendment as authoritatively laid down by this Court. Courts all over the country have had difficulty understanding Gertz. Reference has already been made to the split over whether Gertz requires its standards be applied to defamation by

defendants other than members of the press or news media. Similar splits in the jurisprudence and literature have emerged on such questions as whether Gertz "narrows" or "broadens" the public figure category; the meaning of the "fault" standard for private plaintiffs; and the force of the "actual injury" requirement. The instant case involves serious confusion on the part of the Louisiana courts as to the requirements of the First Amendment decisions of this Court. These questions need answers:

(1) Does Gertz mandate protecting media statements of opinion on public matters unless "knowing or reckless falsity" is shown? If so, is a statement of the form, "There is serious question whether (we believe that) X is guilty of corrupt (immoral, illegal) practices," an expression of opinion?

(2) Is Gertz confined to defamation by members of the press and broadcasting media?

(3) Is a statement made with "knowing or reckless falsity" when the utterer is fully aware of his ignorance respecting its accuracy?

VI.

PLAINTIFF WAS DENIED CONSTITUTIONAL RIGHTS TO DUE PROCESS THROUGH THE MISAPPLICATION OF THIS COURT'S DEFAMATION DECISIONS.

"It is a fallacy . . . to assume that the First Amendment is the only guidepost in the area of state defamation laws. It is not. * * * [I]mportant social values . . . underlie the law of defamation. * * * The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being--a concept

at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual states under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system". (Stewart, J., concurring in Rosenblatt v. Baer, 383 U.S. 75, 92 (1965).)

"The need to avoid self-censorship by the news media is . . . not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. * * * The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory

falsehood. We would not lightly require the State to abandon this purpose . . ." (Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).)

Under the defamation law of Louisiana that was in force before the New York Times series of decisions by this Court, plaintiff would have recovered. See Madison v. Bolton, 234 La. 997, 102 So. 2d 433 (1958). Under the pre-Mashburn Louisiana jurisprudence interpreting this Court's decisions in the Times series, plaintiff would have recovered. See Forrest v. Lynch, 347 So.2d 1255 (La.App. 1st Cir.), writ refused 351 So.2d 168 (La. 1977), cert. denied 98 S.Ct. 1612 (U.S. 1978); Francis v. Lake Charles American Press, 262 La. 875, 265 So.2d 206 (1972), appeal dismissed 410 U.S. 901 (1973). Even under the Mashburn misinterpretation of the Gertz case, plaintiff should have

recovered, because: (1) the statements made about plaintiff were statements of fact, not expressions of opinion; (2) defendant was not a member of the press or other news media; (3) plaintiff could show "knowing or reckless falsity" Yet the court of appeal, on a mistaken view of the meaning of this Court's decisions in Times and Gertz, and on a mistaken view of the meaning of the Louisiana Supreme Court's interpretation of those cases in Mashburn, reversed a jury verdict in plaintiff's favor and rendered judgment for defendants Under those circumstances, plaintiff has been deprived of constitutional rights to due process of law under the Fourteenth Amendment, as well as of the constitutionally-based right of personality and reputation referred to in the quoted portions of Rosenblatt and Gertz, supra.

CONCLUSION

This case presents issues of great public importance. A victory for plaintiff would buttress the important social values of private reputation and human dignity, while signalling that organizations such as defendant, repositories of great public confidence and concomitant power, must function in accordance with the dictates of fundamental tort law. The human issue involved is whether a highly respected organ of established business can with impunity act to expunge a legitimate competitor from the list of competition. The aims of the First Amendment are not well served by permitting irresponsible and damaging accusations to be circulated in the guise of quasi-official "opinion".

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Louisiana Court of Appeal, First Circuit.

Respectfully submitted,

D. Bert Garraway
1851 Plank Road
Baton Rouge, La. 70803
(504) 387-0358

Bart Eaton
911 N. Lobdell Blvd.
Suite C
Baton Rouge, La. 70806
(504) 927-8700

David W. Robertson
2500 Red River
Austin, Texas 78705
(512) 471-5151

November, 1978

I, BART EATON, one of the attorneys for Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22 day of December, 1978, I served three copies of the petition for a writ of certiorari on respondents by mailing the same, through the United States mail, to counsel of record for St. Paul Fire & Marine Insurance Company, Anthony Clessi, Esq., 435 Louisiana Avenue, Baton Rouge, Louisiana 70802, and to counsel of record for Better Business B Bureau of Baton Rouge Area, Inc., Donald Phelps, Esq., 8225 Florida Boulevard, Third Floor, Baton Rouge, La. 70815, first class, postage pre-paid. I further certify that all parties required to be served have been served.

December 22, 1978.

Bart Eaton

BART EATON

APPENDIX "A"

ECONOMY CARPETS MANUFACTURERS & DISTRIBUTORS, INC.

VS.

BETTER BUSINESS BUREAU OF BATON ROUGE AREA, INC., AND ST. PAUL FIRE AND MARINE INSURANCE COMPANY

Number 11,748

First Circuit Court of Appeal
State of Louisiana

APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT, EAST BATON ROUGE PARISH, HONORABLE MELVIN A. SHORTESS, JUDGE, PRESIDING.

Before Landry, Sartain and Ellis, JJ

LANDRY, Judge

Defendants, Better Business Bureau of Baton Rouge Area, Inc. (BBB) and its insurer, St. Paul Fire and Marine Insurance Company (St. Paul), (Appellants), appeal from judgment dismissing their exceptions of no cause of action to the defamation suit filed against them by Economy Carpets Manufacturers & Distributors, Inc. (Economy), (Appellee), and

from judgment in favor of Economy for damages awarded pursuant to jury verdict finding BBB guilty of defamation. Economy has appealed, seeking an increase in the award for defamation and also for damages for alleged conspiracy by BBB to restrain trade, which latter claim was rejected by the jury. We affirm the judgment denying Economy damages for alleged restraint of trade. We reverse the judgment in favor of Economy for damages for defamation and dismiss Economy's claim in toto.

By original petition filed May 9, 1975, and five supplemental and amending petitions, Economy sued BBB, St. Paul and numerous other defendants, including the State of Louisiana, Through the Governor's Office of Consumer Protection, seeking damages for defamation resulting from a BBB Special Bulletin published in October, 1974, and alleged conspiracy by defendants to restrain trade in

violation of La. R.S. 51:122. After numerous legal maneuvers, Economy dismissed its action as to all defendants except BBB and St. Paul, which parties filed peremptory exceptions of no cause of action. The exceptions are based on the contention that the bulletin in question contained no language capable of having a defamatory meaning and that the bulletin was privileged under the First Amendment to the United States Constitution. The trial judge dismissed the exceptions of no cause of action, and the matter went to trial on the merits against BBB and St. Paul on the issues of defamation and restraint of trade. The jury rendered a verdict in favor of Economy for $1,000,000.00 on the defamation charge, but rejected Economy's claims for damages for alleged restraint of trade. Economy appealed. BBB and St. Paul timely applied for a new trial.

Following applications by BBB and St. Paul for writs, this court instructed the trial judge that he could entertain the applications for new trial despite the prior appeal by Economy. A new trial was granted BBB and St. Paul restricted to the issue of damages for defamation. The trial judge reduced damages to $30,000.00 from which judgment Appellants appealed.

BBB and St. Paul allege error as follows: (1) the jury was manifestly wrong in finding that the Special Bulletin was defamatory; that the statements therein were not true; and, that the publication was not privileged; (2) the trial judge was wrong in refusing to admit in evidence the record of a suit brought against Economy by the Attorney General, State of Louisiana, which record includes, inter alia, an injunction prohibiting Economy from engaging in certain specific advertising practices,

despite the trial judge having allowed Economy to introduce in evidence an Assurance of Voluntary Compliance (AVC) signed by Economy as a result of the Attorney General's suit; and (3) the trial judge erred in instructing the jury on negligence and fault and refusing to instruct that malice, actual or implied, is an essential element of defamation.

Economy urges as error: (1) the trial judge's reduction of the jury award from $1,000,000.00 to $30,000.00; (2) the trial judge erred in instructing the jury that for BBB to be guilty of conspiracy, conspiracy must be shown between BBB and other parties and refusing to instruct the jury that a corporation and its own officers may be guilty of conspiracy without the participation of others; (3) the trial judge erred in giving instructions which in effect limited jury consideration of the issue of

defamation to the October, 1974 Special Bulletin; and, (4) the trial judge's refusal to instruct the jury that improper motive or evil intent is not necessary to constitute a violation of La. R.S. 51:122.

BACKGROUND INFORMATION

BBB is a voluntary non-profit corporation with a membership of merchants, business men, professionals, tradesmen, industries and individuals and concerns furnishing personal services to the public. It is essentially a consumer information service. Although there are such bureaus in cities throughout the nation, each such bureau is a separate entity chartered by local business interests. BBB has a membership of approximately 1300 individuals and concerns. It operates on an annual budge of approximately $160,000.00 provided by fees ranging from an annual minimum of $100.00 for

individuals and small concerns to a graduated maximum of several times that amount for corporations, depending upon the number of corporate employees. It has a President, Vice President and an office staff of five employees consisting of secretaries, stenographers and file clerks. The objectives of BBB are to: (1) promote and assist in maintaining truth, honesty and accuracy in business selling practices and increase and justify public confidence in the printed and spoken word of business; (2) advocate and assist in maintaining fair competition in business; (3) inform and educate the public to the difference between honest and legitimate advertising and selling and that which is dishonest and improper, and by all proper means prevent the public from being misled and taken advantage of by unfair advertising practices; (4) cooperate with other such

organizations having the same objectives; (5) cooperate with and assist duly constituted authorities in matters involved in accomplishing the above objectives; and (6) do all necessary to carry out the purposes of the organization.

To accomplish these objectives, BBB maintains a file on each of its members and such non-member businesses in the community as it can with the staff and funds available. Because of its financial limitation, it is to some degree selective in keeping files on non-member businesses. It endeavors, however, to keep as many files as possible, but addresses itself to those situations which in its judgment are most important. It is especially interested in and gathers information about new businesses. It addresses inquiries and makes suggestions and recommendations concerning advertising and business practices to

members and non-member concerns alike when its attention is directed to some alleged improper advertising or business practice, whether by consumer complaint or its own continuous monitoring of newspaper, television commercials, radio and other media forms of advertising.

BBB receives requests for information from similar organizations in other communities throughout the nation. It also receives from members and non-members alike, hundres of requests for information concerning businesses in the Baton Rouge trade area. In addition, it receives innumerable complaints, written and oral, from members and non-members, of alleged misleading advertising and questionable business practices by member and non-member businesses in Baton Rouge. An attempt is made to investigate each complaint by contacting the alleged offender and requesting an explanation

of the alleged misconduct. Such requests are often made in writing and sometimes by telephone or personal contact. A precise record is kept of each complaint, the action taken thereon, and the response thereto. In most instances, a single letter or contact pointing out the nature of the complaint and suggesting which corrective measures should be taken results in cessation of the conduct or practice involved. BBB has no regulatory or enforcement authority. When persuasion and suggestion fail to terminate a practice deemed detrimental to the consumer public, BBB refers the matter to such regulatory agency as it deems best suited to handle the particular problem. The alleged offender is notified of the referral, which is usually to some agency such as the Federal Trade Commission, the Governor's Office of Consumer Protection or the Attorney General of

Louisiana. The referral agency is given a report of the problem and requested to investigate and invoke its regulatory and enforcement authority, if warranted.

As a further service, BBB issues approximately eight bulletins each year. These publications inform that a particularly troublesome problem exists with a given business, agency or industry which has failed to correct the subject matter of complaints or practices which the BBB has found questionable. The bulletins alert members and consumers to the problem, the efforts of BBB to halt the impropriety, and the response or lack thereof on the part of the business involved. In addition to these regular bulletins, BBB issues two or three Special Bulletins each year, dealing with matters it considers of grave concern and regarding which it has been unable to obtain satisfactory explanation

or solution.

In January, 1969, Jesse Jarreau began operation of a retail carpet establishment under the name of Economy Carpets, Inc., which concern became a BBB member. Jarreau ran the business until 1973, when his establishment was destroyed by fire and he lost his entire stock. Jarreau's sister, Mrs. Joyce Langlois, was an employee of Economy Carpets, Inc. After the fire, the business went into bankruptcy. Thereafter, Jarreau and his sister renewed retail carpet selling as Carpet Distributors, Inc. (Distributors). In late 1973, or early 1974, Jarreau purchased a carpet making loom and had it installed in Distributor's warehouse. Subsequently, Distributors became Economy Carpets Manufacturers and Distributors, Inc., a corporation wholly owned by Mrs. Langlois. Although Jarreau stoutly disclaims any interest or

ownership in Economy (claiming to be only an employee), Jarreau has run and has had complete control of both Distributors and Economy, the same as he had with the predecessor firm, Economy Carpets, Inc. Neither Distributors nor Economy have ever been BBB members.

With the advent of Distributors, disputes arose between Jarreau and BBB concerning information given by BBB to inquiries concerning Distributors. BBB responded to such inquiries by advising that Distributors was owned by Mrs. Langlois, who had previously worked for Economy Carpets, Inc., which concern had gone bankrupt. Through its attorneys, Distributors requested BBB to cease informing inquirers that Distributors was the successor to Economy Carpets, Inc., and that Economy Carpets, Inc. had gone into bankruptcy.

On January 7, 1974, Charles Dale

Ramirez, Vice President of BBB, wrote Mrs. Langlois an inquisitorial letter concerning comparison price advertising by Distributors, in which advertisement articles were offered for reportedly reduced prices, using a former price comparison. Such an ad would be improper unless the basic comparison price quoted was the actual price for which the article sold formerly. Ramirez wrote the letter on his own initiative after reading an ad in a Sunday newspaper. On March 6, 1974, Ramirez wrote concerning an ad by Distributors offering to carpet any room -- regardless of size -- for $149.00 and customer complaints that Distributors could not or would not make good on the offer. The letter contained the names and addresses of the complainants. On April 9, 1974, Ramirez wrote in reference to a customer complaint received April 8, from a prospective purchaser

who attempted to buy a remnant offered in an ad published April 7. The customer reported inability to buy the remnant advertised despite having gone to the store early on the morning of the 8th. This letter also noted that Economy was now claiming to be a carpet manufacturer from whom carpet could be purchased directly as from a mill, with no intervening middleman. By letter dated May 9, 1974, Ramirez expressed concern over an Economy ad of May 5 indicating a sale of remnants of carpeting made by Economy in its own mill. On August 29, 1974, Ramirez took issue with a television commercial in which Jarreau appeared and indicated that Economy was making thousands and thousands of yards of carpet in its Baton Rouge warehouse, and which ad showed a carpet loom operating in the background. This letter also questioned a newspaper ad in which Economy offered $7.50 per

yard carpet for $1.88 per yard; $5.00 per yard carpet for $1.00 per yard; and $6.00 per yard carpet for $1.50 per yard. Ramirez expressed doubt that Economy was making thousands and thousands of yards of carpet as claimed, and requested verification in the form of the names of the companies which applied secondary backing to the raw carpet made by Economy, invoices for materials purchased to make carpeting, and sales slips showing the sale of carpeting made by Economy. In addition to the television commercial and newspaper ad, Ramirez' last inquiry was prompted by visits which he and other BBB employees made to Economy's premises where a single carpet loom was observed in the warehouse, but was never found to be in operation. BBB received no response to any of its five letters of inquiry.

Based on the unanswered

correspondence, verbal and written complaints from customers, and shopping episodes by decoy shoppers sent out by himself, Ramirez became convinced that Jarreau would not cease what Ramirez considered to be deceptive and misleading advertisement, bait and switch business practices and false claims of being a carpet manufacturer. Ramirez published a BBB Special Bulletin dated November, 1974, and entitled: "BBB Questions Economy Carpets Ads", which bulletin is reproduced in full and attached hereto.

Approximately 13,500 copies of the bulletin were distributed by BBB through its regular channels, namely, to BBB members and other interested persons and organizations, including the Governor's Office of Consumer Protection and the Attorney General, State of Louisiana. No copies of the bulletin were released by BBB to any news media. The bulletin

gained widespread circulation in the Baton Rouge area. There is some evidence of the bulletin being found in Georgia, which the record shows to be the carpet making center of the nation.

On November 5, 1974, Ramirez wrote a letter to Charles W. Tapp, Director, Governor's Office of Consumer Protection, requesting an investigation of suspected bait and switch advertising by Economy, based on consumer complaints and Mrs. Langlois' failure to respond to any of Ramirez' written inquiries. In turn, Tapp referred the matter to the Attorney General. Negotiations between Tapp, the Attorney General's Office and Jarreau resulted in an Assurance of Voluntary Compliance being signed by Jarreau on February 11, 1975, as the solution of an action brought by the Attorney General's Office against Economy. In the AVC, Jarreau, on behalf of Economy, agreed to

changes in the advertisement concerning comparative prices and claims of never being undersold. On February 12, 1975, Tapp received a letter from Ramirez questioning Economy's claim of manufacturing "thousands and thousands of yards of carpeting" in Economy's Baton Rouge mill. Ramirez also suggested that Tapp obtain another AVC from Jarreau concerning the claim that Economy was a manufacturer of carpeting. The manufacturing claim was negotiated for some time between Tapp and Jarreau with little or no cooperation from Jarreau insofar as concerned the supply of information requested by Tapp to substantiate the claim that Economy manufactured a large part of the carpeting it sold. Ultimately, the issue was resolved by Tapp agreeing to an AVC signed by Jarreau on January 7, 1976, which stated in effect that Economy could advertise production of 15% of the carpet

it sold, and that said figure was subject to change. Tapp testified he was never shown production figures requested of Jarreau but that he agreed to the second AVC merely to settle the issue. Subsequently, an injunction was sought and issued against Economy in the suit brought by the Attorney General. The injunction prohibited Economy from advertising that it was making a substantial amount of the carpet it sold. The trial court prohibited Appellants from introducing in evidence the proceedings against Economy and the action taken therein despite having allowed Economy to introduce the AVC in evidence. Appellants proffered the record. We find that the trial judge erred in refusing to admit the record and that the record should be considered.

THE EXCEPTIONS OF NO CAUSE OF ACTION

BBB's exception asserts that the

petition herein fails to allege facts sufficient to support a finding of conspiracy pursuant to La. R.S. 51:122. The basis of St. Paul's exception is that the language in the Special Bulletin of October, 1974 is neither defamatory nor capable of defamatory interpretation.

Although the facts alleged as constituting conspiracy in restraint of trade are vague, the exception of BBB must be denied because an interpretation of the allegations most favorable to Economy does support a cause of action pursuant to La. R.S. 51:122.

St. Paul's exception presents a more complex issue. When this matter was tried, our Supreme Court had not rendered its decision in Mashburn v. Collin, _____So.2d_____, (La. 1977). Mashburn held that a defendant in a defamation suit, who is expressing an opinion as opposed to making a statement of fact,

is entitled to a "fair comment privilege". Interpreting the United States Supreme Court decisions in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L. Ed. 2d 686 (1964) and Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed 2d 789 (1974), our Supreme Court stated in Mashburn: "In the Gertz decision it is strongly indicated that the Court, in relaxing the stringent test of the New York Times rule in cases brought by private individuals, was speaking in terms only of libelous misstatements of fact, and that mere comment or opinion on public matters, even though defamatory, enjoys the unqualified protection of the First Amendment." See also Letter Carriers v. Austin, 418 U.S. 264, 94 S.Ct. 2770, 41 L. Ed. 2d 745 (1974). Mashburn also noted: "We conclude, therefore, that the First Amendment freedoms as defined

by the New York Times-Gertz series of decisions affords, at the very least, a defense against defamation actions for expressions of opinion about matters of public concern made without knowing or reckless falsity". _____So.2d_____, _____. Mashburn requires the following inquiries: (1) Does the Special Bulletin constitute opinion; (2) Does it contain any misstatement of fact; (3) Was any expression of opinion in the bulletin made with knowing falsity or reckless disregard of the truth or falsity thereof; and, (4) Is the subject matter of the bulletin a matter of public concern. Pretermitting consideration of all other inquiries, it is evident that whether the bulletin contained misstatements of fact and whether such misstatements were made with knowing falsity or with reckless disregard as to the truth or falsity thereof, are issues

which cannot be decided on the fact of the pleadings. For this reason alone, St. Paul's exception must be denied.

THE MERITS OF THE DEFAMATION ISSUE

Economy contends it was defamed by numerous telephone messages by BBB in response to consumer complaints; by the letters Ramirez wrote to Economy; by correspondence by Ramirez to the Governor's Office of Consumer Protection; and by communications to the Attorney General, State of Louisiana. We find that only the Special Bulletin of October, 1974 warrants consideration in this regard.

Mashburn establishes the following test to determine the difference between statement of fact and opinion: "the crucial difference ... depends upon whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression

of the speaker or writer's opinion, or a statement of fact. The opinion may be ostensibly in the form of a factual statement if it is clear from the context that the maker did not intend to assert another objective fact, but only his personal comment on the facts which he had stated. An expression of opinion occurs when the maker of the comment states the facts on which his opinion of the plaintiff is based and then expresses a comment as to the plaintiff's conduct, qualifiaction or character; or when both parties to the communication know the facts or assume their existence, and the comment is clearly based on the known or assumed facts in order to justify the comment." So. 2d , .

Employing the foregoing guidelines, we find that much of the text of the Special Bulletin, as well as the impressions and implications which may be

drawn therefrom, constitutes opinion. After stating objective facts, including the use of BBB shoppers, reproducing the questioned newspaper ad, and mentioning results of findings based on visits to Economy's establishment, the publication states: "These facts combined raise serious questions concerning not only the accuracy of the company's advertising, but also the overall impression it creates...that is... locally made, mass-produced, low-priced carpets." The language is labeled as opinion in that it is said to be the subject of some "question" or doubt by the BBB. We also find that the summary of the publication makes clear the nature of the comments by stating that the questions posed have been referred to the Governor's Office of Consumer Protection with the request that an investigation be made to "obtain proof of accuracy" or "demand corrective changes"

in the questioned conduct. The purpose of the circular affords further support for the finding that the bulletin expresses opinion. Having no enforcement authority, BBB can only provide information, express an opinion on the information developed, advise the public as to protective measures when dealing with a particular establishment, then let the public make its own decision and draw its own conclusions.

Does the Special Bulletin contain misstatement of fact? Dale Ramirez, Vice President of BBB and James Kolter, President of BBB, substantiated the veracity of each factual statement in the bulletin. Both witnesses considered each sentence of the article individually and on the basis of their own knowledge and actions, and the testimony of other witnesses proved the truth of each separate statement standing

alone. The more difficult question is whether the factual statements imply or insinuate illegal or immoral conduct on the part of Economy, which insinuations or implications were not true. We do not find this to be the case.

Economy produced innumerable witnesses who testified in effect that the bulletin was incorrect in its assessment of the amount of carpet produced by the single loom in Economy's warehouse. The bulletin does not attempt to assess or estimate the amount of carpet the loom could make. The bulletin merely points out the observations of BBB personnel who visited the warehouse and requested verification of the capacity of the loom. The bulletin does not imply that the loom cannot produce carpet as claimed by Economy, but that Economy failed to respond to BBB's numerous request for verification of loom capacity or

capability to manufacture "thousands and thousands of yards of carpet", and that in BBB's opinion, Economy should prove its claim. The title of the bulletin and remarks contained therein indicate clearly that BBB is addressing questions to Economy and that the questions should be answered in the interest of fair advertising and honest business practices. We find that the impression the article is fairly calculated to produce, and the impression it would naturally engender in the mind of an average person is that BBB has raised questions concerning the accuracy of Economy's advertising that Economy manufactures a considerable amount of the carpet it sells, and that the claim should be investigated. Were the expressions in the bulletin malicious, meaning were they knowingly false or made with reckless disregard as to their truth or falsity? The burden of

proof rests upon Economy in this regard. Admittedly, the burden is onerous. Essentially, Economy attempted to establish that the bulletin was not published to question or challenge Economy's business practices, but was intended to drive Economy out of business because Economy was not a BBB member. We find the record totally devoid of evidence to substantiate this contention. On the contrary, the proof preponderates overwhelmingly in favor of the conclusion that the bulletin was issued solely to make available to BBB members and consumers the information which BBB had developed concerning Economy in order to promote knowledgeable dealing with Economy by prospective purchases of carpeting. This finding of fact does not require our finding manifest jury error herein. In instructing the jury, the trial judge did not have the benefit of

Mashburn, and the jury was not instructed in the light of Mashburn's interpretation of the "fair comment" privilege afforded by the First Amendment of the United States Constitution. On the contrary, the interrogatories presented the jury included one that requested a finding of whether or not BBB was at "fault".

Is the subject matter of the bulletin a matter of public concern? The information was provided with regard to a merchant who engaged in extensive advertising in the news media with the object of attracting prospective purchasers and customers to his establishment and thereby increasing his sales and profit. We find a business enterprise so conducted is a matter of public concern and interest. . Applying the principles of Mashburn to the case at hand, we find the Special Bulletin in question was privileged as "fair

comment" and that Economy's claim for damages for defamation must be rejected.

RESTRAINT OF TRADE

In essence, Economy maintains that the action of BBB in publishing the Special Bulletin, giving alleged adverse, critical and defamatory information in response to consumer inquiries, referral of the matter to the Attorney General's office for investigation and sending BBB shoppers to Economy's establishment, taken as a whole, constitute a calculated intent, scheme and effort to run Economy out of business and therefore amounts to a violation of La. R.S. 51:122.

The alleged conspirators are the subject of some confusion inasmuch as defendants alleged to have been co-conspirators have been voluntarily dismissed from this action, leaving BBB as the sole alleged conspirator. This confusion was somewhat enhanced by the trial

judge's refusal to grant Economy's requested charge that a conspiracy could result from the action of BBB employees conspiring among themselves, and that to prove conspiracy, it was not necessary that Economy establish that BBB employees had conspired with corporations or persons other than BBB employees. The jury found that BBB did not "conspire with anyone, named or unnamed ... to restrain trade and/or commerce as it might affect the plaintiff." Economy contends that the instruction given improperly limited recovery on the restraint of trade issue because BBB could have conspired with its own employees and the instruction given did not allow such a finding. Appellants argue that the instruction was proper because Economy's contention necessitates a finding that BBB as a corporate entity can conspire with individuals. Realistically, a

corporation acts through, not with, its officers and employees.

La. R.S. 51:122 provides that:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in this state is illegal."

Economy argues that the statute does not require proof of evil motive or specific intent to restrain trade if such restraint is a necessary consequence of the questioned acts. The statute and jurisprudence, however, indicate clearly that the purpose of the acts must have been to restrain trade. See Tooke & Reynolds v. Bastrop Ice & Storage Co., Inc., 172 La. 781, 135 So. 239 (La. 1931).

We find it was error for the trial judge to refuse Economy's requested instruction concerning conspiracy. We also find, however, that the error was harmless in view of the proof offered by

Economy to establish the conspiracy charge. We find as a fact that Economy has failed utterly to establish conspiracy on the part of BBB employees, either among themselves or in consort with others. Had the requested instruction been given, there is no credible evidence of record on which the jury could have found conspiracy in this instance.

To establish the alleged conspiracy, Economy relies upon testimony regarding: (1) alleged solicitation of complaints by Ramirez; (2) alleged attempts by BBB Board member Richard Lipsey to compel an advertising agency to drop Economy's account; (3) complaints to BBB from a BBB member concerning Economy's advertising practices; (4) alleged erroneous information imparted to consumer inquires when such information was based on only one consumer telephone complaint; and (5) publication of the

October, 1974 bulletin.

Economy claims complaints were solicited from Joe Alcocer and Mrs. Jo Ann Monte. Mr. Alcocer's testimony is disputed by Ramirez. Mr. Alcocer, a tailor, was a former tenant of Ramirez. Alcocer testified that Ramirez requested him to pretend to shop at Economy and then file a complaint with BBB regardless of the results of the visit. Ramirez testified that on an occasion when he spoke with Alcocer concerning rent money that Alcocer owed him, Alcocer solicited information from Ramirez about carpet firms because Alcocer intended to purchase some carpeting.

By coincidence, Mrs. Monte was shopping at Economy on one of Ramirez' visits to that concern. Ramirez overheard Mrs. Monte's verbal complaint to a clerk to the effect that she was unable to purchase an advertised article.

Ramirez suggested that Mrs. Monte write a complaint to BBB. Although Ramirez approached Mrs. Monte and inquired what the clerk had told Mrs. Monte about the advertised article, there is no evidence that Ramirez solicited or importuned Mrs. Monte to make a complaint.

Richard Lipsey, a BBB Board member, criticised one of the partners of an advertising firm for handling Economy's advertising. Mr. Lipsey is not a competitor of Economy; he is engaged in an entirely different line of endeavor. As an individual, or even a member of the BBB Board, Mr. Lipsey was free to make such criticism, if he chose. No ulterior motive on the part of Mr. Lipsey was shown. More importantly, the record is barren of proof that any other officer or any employee of BBB was aware of Lipsey's action, or conspired with Lipsey in any fashion whatsoever.

As additional evidence of alleged conspiracy, Economy showed that Sam Lacour, a BBB member and one of Economy's major competitors, complained to BBB about Economy's advertising. Economy also established that BBB reported to inquirers that Economy required payment in full for carpeting before installation, which information was based on one consumer telephone call. Such incidents provide no substantiation for the charge that they were intended or had as their purpose the restraint of trade.

The testimony of Dale Ramirez and James H. Kolter (President of BBB from January 1, 1966 to September 15, 1975), is that the letter inquiries to Economy, the BBB shopping at Economy's store, and publication of the Special Bulletin were merely additional efforts to discharge BBB's function of informing the public. They explained that

the referral to the Governor's Office of Consumer Protection and the State Attorney General were warranted because of Economy's persistent refusal to respond to the written inquiries and furnish satisfactory proof of the claim that Economy was a large manufacturer of carpeting and could therefore undersell its competitors. They also testified that had Economy answered the questions posed and furnished the information desired, the Special Bulletin would not have been published and that the Attorney General would not have been requested to investigate Economy. We conclude that the record fails to establish the alleged conspiracy.

The judgment awarding Economy $30,000.00 in damages for defamation is reversed and set aside and judgment is rendered herein in favor of BBB and St. Paul, dismissing said claim, with

prejudice. The judgment rejecting Economy's claim for alleged restraint of trade is affirmed and judgment is rendered herein rejecting Economy's claim in toto, all costs of these proceedings to be paid by Economy.

Affirmed in part, reversed in part and rendered.

BBB

Special Bulletin

BETTER BUSINESS BUREAU OF BATON ROUGE AREA, INC.
JAMES H. KOLTER, PRESIDENT
200 LAUREL STREET • BATON ROUGE, LOUISIANA

PUBLIC PHONE — 344-8551
MEMBERS' PHONE — 344-1518

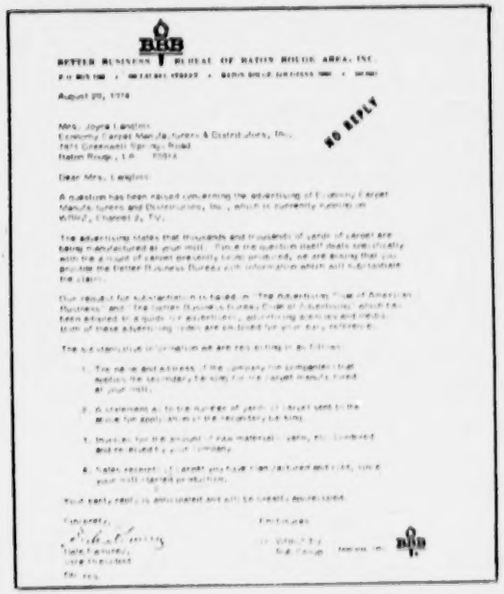
Volume XXV, Number 4 October, 1974

BBB Questions Economy Carpets' Ads

During the past year, the Baton Rouge Area BBB, on five different occasions, has questioned the advertising claims made by **ECONOMY CARPETS MANUFACTURERS AND DISTRIBUTORS, INC.**, 7871 Greenwell Springs Road.

As noted in the copy of an August 29th letter, which we have reproduced below, the Bureau wrote to the firm's president, Mrs. Joyce Langlois and requested verification of claims being made in television commercials which the company was running at that time. The advertising in question dealt mainly with the company's claim that "Thousands and Thousands of Yards of Carpeting are being Manufactured at our Mill" . . . (To date, the Better Business Bureau has received no reply from the company nor any substantiation of ad claims as requested in the BBB's letter of August 29th).

(Continued on back page)


BBB

BETTER BUSINESS BUREAU OF BATON ROUGE AREA, INC.

August 29, 1974

NO REPLY

Mrs. Joyce Langlois
Economy Carpet Manufacturers & Distributors, Inc.
7871 Greenwell Springs Road
Baton Rouge, La. 70814

Dear Mrs. Langlois:

A question has been raised concerning the advertising of Economy Carpet Manufacturers and Distributors, Inc., which is currently running on WBRZ, Channel 2, TV.

The advertising states that thousands and thousands of yards of carpet are being manufactured at your mill. Since the question itself deals specifically with the amount of carpet presently being produced, we are asking that you provide the Better Business Bureau with information which will substantiate the claim.

Our request for substantiation is included in "The Advertising Code of American Business," and "The Better Business Bureau's Bureau of Standards, which has been adopted as a guide for advertisers, advertising agencies and media. Both of these advertising codes are enclosed for your early reference.

The substantiation of information we are requesting is as follows:

1. The name and address of the company (or companies) that applies the chemicals, ink, etc. to the carpet backing fabric at your mill.
2. A statement as to the number of yards of carpet sold to the above for application of the chemicals to this.
3. Invoices for the amount of raw material, yarn, etc. purchased and received by your company.
4. Sales receipts for carpet you have manufactured and sold, since your mill started operation.

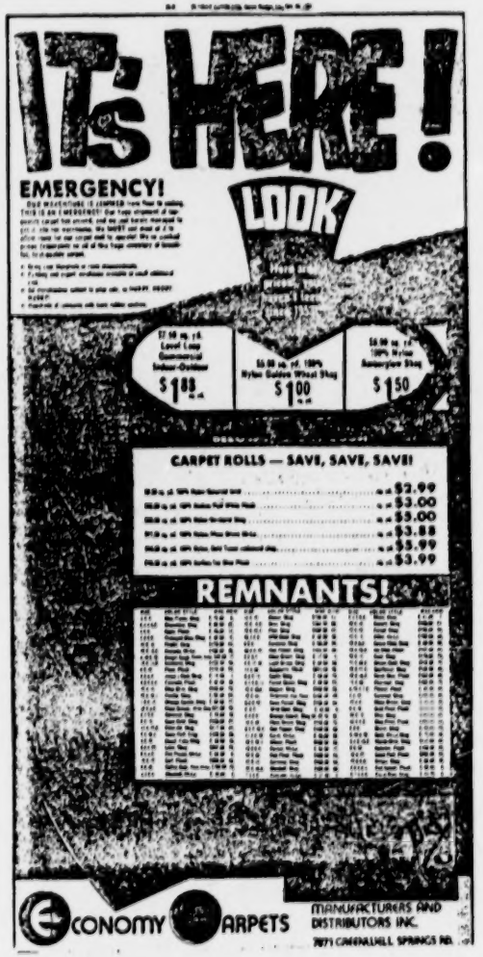
Your early reply is appreciated and will be treated confidentially.

Sincerely,

Executive Vice President

Enclosures

BBB



BBB Questions Economy Carpets' Ads . . .

(Continued from front page)

Bureau visits to Economy Carpets' Greenwell Springs Road location thus far have revealed the presence of only one carpet loom in the warehouse at the rear of the premises. In addition, BBB shoppings conducted at the company's place of business during early September seem to indicate that the firm's salesmen showed little, if any, interest in selling carpeting which the company claimed to be manufacturing at that time. These facts combined raise serious questions concerning not only the accuracy of the company's advertising but also the overall impression it creates . . . that is . . . locally made, mass-produced, low-priced carpets.

In addition to the questions which have been raised concerning the company's ability to manufacture thousands and thousands of yards of carpeting the BBB also has questioned advertisements such as the newspaper ad which ran in the Sunday Advocate, October 20, 1974 (reproduced, front page). The claims in question were those which offered $7.50 carpeting for $1.88 per square yard; $5.00 carpeting for $1.00 per square yard; and $6.00 carpeting for $1.50 per square yard.

A BBB staff member visited the company's place of business at approximately 9:30 A.M. on Monday, October 21, 1974 and was advised that all three of the low-cost specials had been sold out between 8:30 and 9:30 A.M., the first day the sale began!!

The company, which began operations locally during October, 1973 has been the subject of a number of consumer complaints. And, about one-half of the complaints which the Bureau has received to date have alleged non-availability of advertised bargains.

CHILDISH

Do you remember the little boy who used to brag that his father was so strong he could beat up all the other fathers in the neighborhood?

Apparently, this little boy has grown to manhood and is now writing advertising claims that he undersells all other stores. Nobody has prices lower than his, whether it be for drugs, groceries, tires, carpeting or stereo equipment.

Childish? Yes. And it's regrettable that we have to see and hear so much advertising that has been condemned not only by all Better Business Bureaus but also by the Federal Trade Commission. It is impossible for any advertiser to have complete and accurate knowledge of all prices in all other stores at all times. In the Baton Rouge Area, the BBB finds that competitors generally meet and beat all such advertised "lowest prices in town".

The Better Business Bureau urges you not to be fooled by "Never Undersold" claims. Look around. You are very likely to find equal or better bargains and better service elsewhere.

As has been the Bureau's policy in the past, when voluntary self-regulation by business has failed, the problem is then referred to the appropriate governmetal agency with a request that an investigation be made. Therefore, the problems which the Bureau has been unable to get resolved on a voluntary basis with **ECONOMY CARPETS MANUFACTURERS AND DISTRIBUTORS, INC.** are now being referred to Mr. Charles Tapp, Director of the Governor's Office of Consumer Protection. We are hopeful that he, along with legal assistance from the Attorney General's Office will be able to obtain proof of accuracy of advertised claims . . . or . . . demand corrective changes if and where required.

BBB Special Bulletin

PUBLISHED FOR MEMBERS, ORGANIZATIONS AND THEIR EMPLOYEES BY

THE BETTER BUSINESS BUREAU of Baton Rouge Area, Inc.

JAMES H. KOLTER, PRESIDENT

P. O. Box 2366
Baton Rouge, Louisiana 70821

BULK RATE
U.S. Postage
PAID
BATON ROUGE, LA.
Permit No. 311

CORRECTION REQUESTED

"APPENDIX B-1"

BBB v. Economy Carpets
February, 1977

JURY CHARGE

Ladies and gentlemen, you have heard the testimony and argument of counsel. It now becomes my duty to charge you as to the law in this case. It is your duty to take the law as I charge it to you.

You are the exclusive judges of the evidence and the credibility of the witnesses. I am not permitted to comment upon what has or has not been proven or upon which witnesses you should believe or should not believe. In judging the credibility of any witnesses, you should take into consideration his or her bearing on the witness tand, his or her capacity or opportunity for making accurate observations and any interest he or she may have in the outcome of

the case.

In criminal cases the State must overcome the presumption of innocence and prove the accused guilty beyond a reasonable doubt. In a civil case, such as this one, the rule is different. There are no presumptions, but the burden is on the plaintiff to prove his case and every essential element thereof to your reasonable satisfaction by a clear preponderance of the evidence.

A preponderance of the evidence does not mean that the plaintiff must have a greater number of witnesses, for it is within your power to believe one witness and disbelieve all of the rest. It is sufficient, if after you have analyzed all of the evidence offered by both sides, giving due consideration to the physical facts in the case, you find that the weight of it is in favor of

the plaintiff. The preponderance of the evidence is that evidence which carries the greatest weight with you. It is the evidence that accords with the best reasoning and probability. Plaintiff is not required to prove his case beyond a reasonable doubt. He merely has to establish by all of the evidence that he presents that his version of the facts is more probable and more reasonable.

Take an imaginary scale. Weigh the evidence in accordance with the rule that I give you, and if the evidence preponderates ever so slightly that the plaintiff has made out his case by a preponderance of the evidence, then judgment will be in his favor because he has discharged the duty placed upon him by law. Conversely, if he has not, and the scale goes the other way or remains evenly balanced, he has failed and his

suit against this defendant should be dismissed. The decision must be based solely and exclusively on the evidence in this case, evidence you have heard this week from this witness stand together with any documents that were received into evidence.

You have heard the testimony of experts. Experts are persons who are learned in a particular science, and they are permitted to express their opinion upon scientific matters at issue. A person may become an expert through years of training and experience and endeavor in a particular line or field of work. Those who are learned in a particular field are permitted to express their opinions on the questions involved, but they are not called into court for the purpose of deciding the case. You, the jurors, are the ones who in law must

bear the responsibility of deciding the case. Experts are merely witnesses, and you have the right to either accept or reject their testimony and opinions in the same manner and for the same reasons for which you accept or reject the testimony of other witnesses in the case. In giving their opinions, experts should state the facts upon which their opinions are based and the value of an opinion of an expert witness is dependent on the existence of facts upon which it is predicated. No material weight or credit may be given such testimony without proper foundation and facts to support that testimony. The weight and credibility you apply to the expert witness is solely within your province and is governed by your decision which you may properly base upon the stated qualifications and opportunity for knowledge in

the particular field of the expert testifying.

There are two kinds of evidence: Direct evidence and circumstantial evidence. Direct evidence is evidence given by witnesses of facts they have actually seen, heard or experienced directly proving a fact in dispute. Circumstantial evidence is evidence of facts or circumstances from which the jury concludes that certain other facts are true which prove a fact in dispute.

To illustrate the difference, I will use the following example:

Suppose the fact in dispute is whether or not a person entered a certain house. As an example of circumstantial evidence, a witness may testify that he heard a door slam and saw a light in the house go on. From the fact that the door was heard to slam and the lights went on, the jury might conclude that

someone entered the house.

Direct evidence of such an occurrence would be a witness testifying that he actually had seen someone enter the house. Note the difference. With circumstantial evidence the conclusion that someone entered the house is reached from the circumstances of a witness having heard the door slam and having seen the lights go on. With direct evidence the jury might conclude that someone entered the house because a witness actually saw the person enter the house.

In arriving at a verdict, you are to consider only the evidence which has been presented to you during the trial of this case. You have no right to consider any fact relating to this case which may have come to your knowledge through any other means.

In presenting their arguments to the jury, the attorneys who are participating

in the trial may discuss the facts as well as the law, and in discussing the evidence, it is proper for them to state to you the conclusions which they have reached as to what facts have been proved and what facts have not been proved. A statement made by a lawyer during the course of his argument relating to the facts in this case does not constitute evidence or proof of those facts, and it is not to be considered by you as evidence. It is simply the lawyers' interpretation of what the evidence establishes. You, of course, should carefully consider all of the arguments presented by counsel, and then with equal care you should analyze the evidence presented during the trial upon which those arguments are based.

Counsel also may argue to the jury their interpretation of the laws

applicable to the case. If the law, as interpreted by counsel in their arguments, however, differs from the law as I give it to you, you must accept the law as given to you by me as being the correct law applicable to the case.

In giving these instructions, it is not my purpose to place special emphasis on any one principle of law You are not to single out any particular sentence or any specific instruction and ignore the others, but you are to consider all of these instructions as a whole and to regard each in the light of all of the others.

You cannot be governed by passion, prejudice, sympathy or any motive whatever except a fair and impartial consideration of the evidence. You must not, under any circumstances, allow any sympathy which you may have or entertain for the plaintiff or defendant to

influence you to any degree whatsoever in arriving at your verdict.

You must remember that all corporations are entitled to the same fair test in your hands as a private individual because the law is no respector of persons. All persons, including corporations and insurance companies, stand equal before the law and are to be dealt with as equals in a court of justice.

Plaintiff in this case has alleged two different actions: (1) a conspiracy by defendant in restraint of trade and, (2) defamation by defendant in its publication of P-1, the special bulletin of October, 1974.

The court will charge you relative to conspiracy, as follows:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in this state is illegal.

No person shall monopolize, or attempt to monopolize, or combine, or conspire with any other person to monopolize any part of the trade or commerce within this state.

Ail combinations and arrangements for the purpose of unlawful stifling or restriction of competition, or which may probably have that effect, are against public policy and unlawful.

The essential elements of a civil conspiracy are (1) two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful or overt acts, and (5) damages proximately resulting therefrom. In order to find the Better Business Bureau of Baton Rouge Area, Inc., conspired against plaintiff, you must, therefore, find that there was a meeting of the minds between Better Business Bureau of Baton

Rouge Area, Inc., and these other persons on the object or course of action, that there was an unlawful or overt act and that plaintiff sustained damages resulting therefrom.

It is not necessary to show that the members a conspiracy expressly bound themselves each with the other to establish and maintain a monopoly, but it is sufficient if it is shown that they acted together in pursuance of a common object; in other words, an agreement or contract in a technical sense need not be shown.

An "overt act" as the term is used in civil conspiracy proceedings, is something apart from a conspiracy, and is an act which must accompany or follow the agreement and must be done in furtherance of, in design to carry out, the purpose or object of the conspiracy.

A combination or agreement which results in restraint of trade is illegal

whether the result is accomplished by the acts of each individual, acting on his own account, in doing as he has agreed to do, or by the joint action of all parties to the combination.

The size and power of a combination or corporation does not of itself render it an unlawful trust or combination. However, the utilization of group power to eliminate a competitor who is equipped to compete has been said to defeat or thwart the purpose of the anti-trust laws to secure equality of opportunity.

A combination illegally to restrain competition is not justified or relieved from invalidity and illegality because it also seeks to eliminate fraud or other undesirable practices.

A conspiracy, like any other fact, must be established by a preponderance of the evidence. That requirement has

heretofore been explained to you.

DEFAMATION

I will now charge you on the law of defamation. Defamation is the publication of any false and unprivileged writing which tends to expose a person to contempt, hatred, ridicule or obloquy; or which causes a person to be shunned or avoided; or which has a tendency to deprive him of the benefits of public confidence or injure him in his occupation; and includes almost any language which upon its face has a natural tendency to injure the person's reputation, either generally or with respect to his occupation. The intent and meaning of an alleged defamatory statement must be gathered not only from the words singled out as libelous but from the context as well, and the true meaning must be ascertained from a consideration of all parts of the statement as well as the circumstances of its publication. The

test is the effect the article is fairly calculated to produce and the impression it would naturally engender in the minds of the average persons among whom it is intended to circulate.

A mere insinuation is as actionable as a positive assertion, if the meaning is plain; and if the words used, when taken in their ordinary acceptation convey a degrading imputation, no matter how indirectly, they are libelous -- it matters not how artfully their meaning is concealed or disguised.

The essential elements of a defamation action are as follows:

1. defamatory words;
2. publication, that is, communication to some person other than the one defamed;
3. falsity;
4. fault;
5. resulting damages.

Before returning a verdict for

Economy Carpets, you must find that all of the above elements have been proven.

Truth is an absolute defense to an action for defamation; therefore, if you find the material contained in the Special Bulletin of October, 1974, is true, you must return a verdict for the defendant, Better Business Bureau of Baton Rouge Area, Inc.

In any civil suit for slander, defamation, or for a libel, instituted in any court of this state, it is lawful for the defendant to plead in justification the truth of the slanderous, defamatory or libelous words or matter, for the uttering or publishing of which he may be sued; and in the trial of the issue in such suit, to maintain and prove his plea by all legal evidence.

Fault is defined as the failure to do something which would be the legal duty of a prudent and reasonable person

to do, or the doing of something that would be the legal duty of a prudent and reasonable person not to do.

The final portion of this charge is concerned with the question of damages. Of course the fact that I instruct you on damages does not indicate that damages are due. I charge you on the entire case on the question of liability and on the question of damages. If you find no liability, of course you need not concern yourself with damages, but if you do find liability you will then proceed to the question of damages. Now, under Louisiana law it is stated, "Every act whatever of man that causes damage to another obligates him by whose fault it happened to repair it." This article contemplates simple reparation, a just and adequate compensation for injuries. It suggests no idea of revenge or punishment. In

estimating damages in cases of this kind you must take into consideration the following elements: loss of business--past, present and future, loss of good will, loss of business, reputation. The burden of proof is upon the plaintiff claiming damages to prove each element of damages by a preponderance of the evidence, which you will recall has already been defined as being such evidence as when considered and compared with that opposed to it has more convincing effect and produces in your mind the belief that what is sought to be proved is more likely true than not true. Bear in mind that damages must be reasonable. In the event that your verdict is for the plaintiff in this case you must award him only such damages as will fairly and reasonably compensate him for the damages which you find. You are not permitted to award speculative damages. This means that you

are not to include in any verdict compensation for prospective loss which, although possible, is wholely remote or conjectural; however, damages are not speculative merely because they cannot be computed with mathematical exactness if under the evidence they are capable of a reasonable approximation. You will be the judge of the value of these damages. It is difficult to translate damages to dollars and cents, but under our system of law that is the only way to compensate a person. Consequently, it is your function to translate damages awarded into dollars and cents. Argument of counsel is not to be considered as evidence as to damages. You must not include in what would be an otherwise just award anything for punishment or anything for the payment of court costs and attorney's fees insofar as the defamation is concerned. These are not elements of

damage. Regarding the conspiracy, the law provides that any person who is injured in his business or property may sue in any court of competent jurisdiction and shall recover threefold the damages sustained by him, the cost of suit, and a reasonable attorney's fee.

If you should find that Economy Carpets Manufacturers and Distributors, Inc., has proved all of the elements of defamation, you may award only those damages which plaintiff has proved, and which are sufficient to compensate him for actual injury. Actual injury includes, but is not limited to out-of-pocket loss. The customary types of actual loss inflicted by defamatory falsehood include impairment of reputations and standing in the community, personal humiliation, and mental anguish and suffering.

In no case can you award damages designed to punish the Better Business

Bureau, if you should find its actions defamatory. All damage awards must be supported by competent evidence concerning the injury.

Now, there are twelve of your number. It requires nine to find a verdict. Heretofore you have been instructed that you could not discuss the case even among yourselves. It will be your duty, each of you, to listen to the discussion and the opinions of your fellow jurors. If there are differences of opinion in the appraisement of the evidence or in any other phase submitted to you for consideration you should make every reasonable effort to reconcile the differences if you can conscientiously do so. It is your duty to find and to return a verdict and when nine of your number are of the same opinion about this case, that ends your deliberation and what that opinion is will be the

verdict.

I will leave with you the special verdict form, which provides

February___, 1977

CONSPIRACY

1. Did the Better Business Bureau of Baton Rouge Area, Inc., conspire with anyone, named or unnamed, according to the law as I have previously recited, to restrain trade and/or commerce as it might affect the plaintiff?

YES_____ NO_____

2. If your answer to question one is yes, determine the damages to plaintiff resulting from any conspiracy, according to the following test: threefold the damage and cost of suit and a reasonable attorney's fee.

$_____

DEFAMATION

1. Was the "Special Bulletin, dated October, 1974, published by the Better Business Bureau, defamatory as regards the plaintiff?

YES_____ NO_____

2. If your answer to question one is yes, was the publication true?

YES_____ NO_____

3. If your answer to question one is yes and question two is no, was the Better Business Bureau at fault in publis ing said "Special Bulletin"?

YES._____ NO_____

4. If your answer to question one is yes, question two is no, and question three is yes, then was the plaintiff damaged as a result of said publication?

YES_____ NO_____

5. Determine the amount of damages plaintiff sustained if your answer to question 4 is yes.

$_____

_____
FOREMAN

When you begin to deliberate, it will be your duty, each of you, to discuss the issues of this case among yourselves. It will be your duty, each of you, to listen to the discussion and the opinions of your fellow jurors. If there is a difference of opinion in the appraisement of the evidence or in any other phase submitted to you for consideration, you should make every conscientious effort to reconcile any differences, if you can conscientiously do so. It is your duty to find and to return a verdict, and when nine of your number are of the same opinion as to your verdict or the answer to a particular interrogatory that ends your deliberation as to the verdict or as to the answer to that particular question, and you should pass on to the next one.

Article 1794 of the Code of Civil Procedure provides as follows:

> "In reaching a verdict, the jurors must rely upon their memories, and when they retire to the jury room to deliberate, they shall not be allowed access to any written evidence or any notes of the testimony of any witness, but may take with them any object or document received in evidence which requires a physical examination to enable them to arrive at a just conclusion."

Again, let me use this illustration. Take an imaginary scale and weigh the evidence in accordance with the rule I have given you. If the evidence preponderates ever so slightly so that the plaintiffs have made out their case by a preponderance of the evidence, then judgment should be in their favor because they have discharged the duty placed upon them by law. Conversely, if they have not, and the scale goes the other way or remains evenly balanced, then they have failed and their suit against these defendants should be dismissed.

The first thing you do when you retire to deliberate is to select from your

number a foreman. This is a term we have used for years, and I do not mean to imply that the foreman has to be a male. Anybody on the jury can be the foreman to represent you in returning the verdict and signing the verdict form.

"APPENDIX B-2"

ECONOMY CARPETS MANUFACTURERS AND DISTRIBUTORS, INC.	NO. 181,734, DIV. D
	19TH JUDICIAL DISTRICT COURT
VS.	
	PARISH OF EAST BATON ROUGE
BETTER BUSINESS BUREAU OF BATON ROUGE AREA, INC., ET AL	STATE OF LOUISIANA

* * * * * * * * * * * * * * *

JUDGMENT IN JURY TRIAL

This cause having been duly tried before and submitted to the jury and the jury having returned a verdict, on February 4, 1977, in words and figures as follows:

"February 4, 1977.

CONSPIRACY

1. Did the Better Business Bureau of Baton Rouge Area, Inc., conspire with anyone, named or unnamed, according to the law as I have previously recited, to restrain trade and/or commerce as it might affect the plaintiff?

YES_____ NO__x__

2. If your answer to question one is yes, determine the damages to plaintiff resulting from any conspiracy, according to the following

tests: threefold the damage and cost of suit and a reasonable attorney's fee.

$_____

DEFAMATION

1. Was the 'Special Bulletin, dated October, 1974, published by the Better Business Bureau, defamatory as regards the plaintiff?

YES__x__NO_____

2. If your answer to question one is yes, was the publication true?

YES_____NO__x__

3. If your answer to question one is yes and question two is no, was the Better Business Bureau at fault in publishing said 'Special Bulletin'?

YES__x__NO_____

4. If your answer to question one is yes, question two is no, and question three is yes, then was the plaintiff damaged as a result of said publication?

YES__x__NO_____

5. Determine the amount of damages plaintiff sustained if your answer to question 4 is yes.

$1,000,000.00

s/ Raymond P. Loupe"
FOREMAN

IT IS ORDERED, ADJUDGED AND DECREED that the said verdict be and it is hereby made the judgment of this court and accordingly the defendant, Better Business Bureau of Baton Rouge Area, Inc. is hereby condemned to pay to the plaintiff, Economy Carpets Manufacturers and Distributors, Inc. the sum of One Million and No/100 ($1,000,000.00) Dollars, with interest at the rate of seven (7%) per cent per annum from the 9th day of May, 1975, and all costs of these proceedings.

JUDGMENT READ AND SIGNED, at Baton Rouge, Louisiana, on this 7th day of February, 1977.

s/Melvin A. Shortess
JUDGE, 19TH JUDICIAL
DISTRICT COURT

"APPENDIX B-3"

ECONOMY CARPETS AND MANUFACTUERS, INC.	NO. 181,734, DIV. D
VS.	19TH JUDICIAL DISTRICT COURT
BETTER BUSINESS BUREAU OF BATON ROUGE AREA, INC.	PARISH OF EAST BATON ROUGE
	STATE OF LOUISIANA

WRITTEN REASONS FOR JUDGMENT

This is a defamation case. The plaintiff brought the action to recover for alleged defamatory statements contained in a special bulletin issued by the defendant in October of 1974. The statements in question were essentially allegations that advertising claims made by the plaintiff corporation concerning its status as a manufacturer of large amounts of carpet were false and misleading. At trial of the matter beginning January 31, 1977, a jury returned a verdict of $1,000,000.00 in favor of the plaintiff. The plaintiff applied for and timely perfected an appeal from this verdict.

After the plaintiff's appeal was perfected, but within the delays allowed by law, the defendant applied for a new trial. This court ruled that under the governing articles of the Code of Civil Procedure, it had lost jurisdiction of the case when the plaintiff's appeal was perfected. The First Circuit, Court of Appeal, on application of the defendant, granted alternative writs ordering this court to hear the motion for new trial or show cause why it should not. The motion was heard and this court granted the new trial as to the issue of damages only. The parties have stipulated that the issue be tried to the court on the record, without a jury.

For purposes of this proceeding, the court is bound by the findings of the trial judge as to liability.*

*(Liability was decided prior to the recent pronouncement of the Louisiana Supreme Court in Mashburn v. Collin, ____So.2d____(La. 1977), wherein First Amendment fair comment guidelines were articulated for Louisiana Courts.)

Therefore, the court assumes that a defamation occurred. The only issue is quantum. The court is not bound by the findings of the jury as to which particular damages, if any, were caused by the defamation, nor as to the extent of such damages. The court is also not sitting in review of the jury's award, but is assessing damages as if no award had been made. This proceeding is in the nature of a new trial as to quantum, not an appeal.

Two types of damages are pertinent in a defamation case: general and special. Special damages are those which are unique to the plaintiff and which are specifically linked to the defamation. General damages are those

which are gauged simply on the basis that a defamation has occurred. Such damages are not the same as punitive damages which can only be awarded under the authority of Article 2315.1 of the Civil Code. This article was enacted in 1976, well after the defamation herein took place, and the court feels that it should not be given retroactive effect. Therefore, punitive damages are not at issue.

Another category of defamation damages pertinent to this case was set forth by the U. S. Supreme Court in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). One holding of that case is that where a court is dealing with public speech that comes within the reach of the First Amendment to the U.S. Constitution, unless the plaintiff proves "malice" under the New York Times v. Sullivan, 376 U.S. 254 (1964) test, he cannot recover punitive damages or presumed damages. A plaintiff

who cannot prove the defamatory statement were made with knowledge of their falsity or with reckless disregard for their truth or falsity must show "actual injury," which is not the same thing as special damages, but which does require some showing of actual harm.

In considering defamation damages generally, the court notes at the outset that the plaintiff's burden of proof, though still based on a preponderance of evidence standard, is heavier than in ordinary civil cases. Ward v. Sears, Roebuck Company, 339 So.2d 1255 (La.App. 1st Cir. 1976). The plaintiff must meet this burden in proving each element of claimed damages. Recovery is limited to an award that will fairly and reasonably compensate it for proven injury. Remote, conjectural or speculative damages are not compensable.

SPECIAL DAMAGES

The plaintiff has alleged three items of special damages:

1. Lost profits from a contract with Scotty Wood;

2. Lost profits from business not done with the State of Louisiana; and

3. Lost profits from business generally.

Plaintiff's proof of the alleged special damages consists of the testimony of Jesse J. Jarreau, John W. Chisholm, Scotty Wood, and Paul A. Hayes, Jr., together with copies of pages from and extracts of business ledgers, income tax returns,and sales tax returns. Other evidence relevent to the damages issue that was not produced by the plaintiff but which was under its control included: the alleged written contract with Scotty Wood; any written evidence of $100,000 to $125,000 in contracts with the State of Louisiana in 1974; any testimony from

the President of the plaintiff corporation, Joyce Langlois; the complete set of ledgers for the business detailing cash receipts, costs of materials, labor, advertising and other expenses; the complete 1975 income tax returns; and finally, any evidence of sales made in interstate commerce. Failre of the plaintiff to produce evidence wholly within its control creates a presumption that the probative value of the evidence would be adverse to plaintiff's position. Loewer v. Vanderhider, 336 So.2d 1011 (La.App. 3rd Cir. 1976); Tillman v. Canal Insurance Company, 305 So.2d 603 (La.App. 1st Cir. 1974).

I. The Contract with Scotty Wood

The plaintiff's proof as to its contract with Scotty Wood consists of: (1) testimony by Wood to the effect that he and Economy Carpets had a contract for

$360,000; that plaintiff's profit would have been between $72,000 and $90,000; that the contract was written on one of Economy Carpet's bills of lading; that because of the allegations contained in the defendant's "Special Bulletin," Wood wanted to get out of the contract; that he contacted Jesse Jarreau for that purpose; and that after "some words" were exchanged over it, Jarreau agreed to let Wood out of the contract; (2) testimony by Jarreau basically confirming what Wood had said about the contract.

Mitigating against plaintiff's recovery on this item is the fact that the alleged contract was never produced by either Wood or Economy Carpets.

This testimony at its best indicates that the parties had a valid contract but that Economy Carpets agreed to cancel it on Wood's request. The plaintiff's failure to product the written

document creates a presumption adverse to its position. Taken cumulatively and considered in light of the heavier burden imposed on the plaintiff in this case, the proof adduced is insufficient to clearly establish that the plaintiff and Scotty Wood had a contract, what was the exact nature of any such contract, and that the contract was breached because of the defamatory actions of the defendant.

The defense was that Jarreau voluntarily cancelled the contract with Wood and has not sought to enforce the contract by legal action or otherwise. This is a causation argument to the effect that the cause of the breach of the contract was not the defamation, but Jarreau's own decision. The counter argument is that but for the defamation, Jarreau would never have been placed in the position of having to choose between

rescission of the contract and legal action to enforce it. The defamation may qualify as a cause in fact of the cancellation. However, plaintiff's proof leaves too many other questions unanswered and too many allegations unverified for such proof to form the basis of an award of special damages. What was the exact nature of the contract? What was its gross value? What was Economy Carpets' exact profit to be? It is the plaintiff's burden to answer such questions. The burden has not been carried in this instance.

II. State Business

The plaintiff's proof as to this claim consists of testimony by Jesse Jarreau and Paul A. Hayes, Jr., Assistant Commissioner of Administration of the State of Louisiana.

Jarreau testified that he had done $100,000 to $125,000 worth of business with the State during 1974, and that in

October of that year he was told not to apply to be on the State Bidders Mailing List by Hayes, because of the "turmoil" surrounding the BBB's Special Bulletin.

Hayes said that he discouraged Jarreau from applying to be on the Mailing List because he did not want to get into a lawsuit; that he did not know if Economy Carpets had ever applied to be on the Bidders Mailing List prior to October of 1974; and that Economy Carpets did not fill out an application until August 12, 1976.

This claim fails for several reasons:

1. Jarreau's claim of prior State business is not supported by any evidence, such as written contracts, bank deposits, ledgers, or cancelled checks, and is in fact refuted by State sales tax returns for 1974, 1975, and for the months of January through May, 1976, which contains absolutely no evidence of sales to the

State, which sales would have been exempt from sales tax.

2. Even it it were assumed that Jarreau's testimony about prior State business is correct, it indicates that not being on the Bidders Mailing List does not prevent a party from doing State business since the evidence is that Economy Carpets was not on the Mailing List prior to August of 1976.

3. The evidence is not that Economy Carpets was prohibited from being on the Mailing List or bidding on State jobs, but that Jarreau was discouraged from applying by Hayes.

4. Neither being discouraged from applying to be on the List nor being prohibited from applying to be on the list prevents a party from learning of State jobs through newspaper or official journal notices and bidding on such jobs.

5. Even assuming that the plaintiff

had shown that it had done business with the State prior to 1974, and had been more or less prevented from being on the Bidders Mailing List because of the influence of the Special Bulletin, the plaintiff has made no proof that had it not been so prevented, it would have submitted bids on State jobs, would have been the lowest responsible bidder on such specific jobs, and finally, would have secured any specific job which generated a profit.

III. Loss of Profits

The proof of this claim consists of testimony by Dr. John Chisholm, plaintiff's economic expert. Dr. Chisholm stated that after examining the plaintiff's records, he concluded that sales for 1974 were $354,000; sales for 1975 were down to $147,000; and sales for 1976 were down to $142,000. He projected on the basis of this date that the plaintiff would need sales of $3,664,000 to recover

from this three-year loss in business. The profits on such sales would range between $732,800 and $916,000, based on a profit margin of between 20% and 25%, he said.

Dr. Chisholm's testimony is sharply contradicted by the testimony of the defendant's expert in the field of certified public accounting, James M. Harris. Harris said that his analysis of the plaintiff's records showed nothing to substantiate Dr. Chisholm's projection. He further said that based on the financial history of Economy Carpets, it would be incorrect to project a growth trend in the business. He said a "downward trend" would be a more correct projection.

Dr. Chisholm's testimony is of dubious value as proof of special damages. He testified that his projections and conclusions were only as accurate as the

data furnished to him. His original testimony at trial was based on a recapitulation of sales prepared by some other party. After objections were made and sustained, the witness was excused to allow him time to examine the plaintiff's records himself. He testified the next day that he had examined the ledger of Economy Carpets and verified the figures in it for 1975 and 1976 sales by comparing those figures to the sales tax returns for the same years. He said he was not furnished the sales tax returns for 1974. On cross examination it was shown that the 1974 sales tax return indicated sales of $191,024.85, while the ledger indicates sales of $354,683.71. Dr. Chisholm said he had relied on the ledger entry in making his projection and that his analysis would have been dramatically different if he had had the figures from the 1974 sales tax returns.

Dr. Chisholm also said that his projections as to the amount of business it would be necessary for Economy Carpets to do in the years subsequent to 1976 for the corporation to reach its 1974 level of business (which level is apparently based on questionable information) was based on his assumption that the corporation's business would increase at a rate of 5% per year. When questioned as to how he could make such an assumption in the fact of 1974 income tax records showing a business loss for the corporation, he answered that his assumption of 5% annual growth was based on the possibility that such growth would occur. He also admitted that it was equally possible that plaintiff would go out of business during that time.

At best, Dr. Chisholm's projection of lost profits is based on inaccurate and unreliable data. At its worst, his

testimony deals in possibilities, where the court must deal in probabilities. His opinion is directly contradicted by an expert of at least equal credibility.

The law applicable to recovery of damages for lost profits is clear:

> "Any loss of earnings or profits from plaintiff's business occasioned by his personal injuries resulting from the accident may of course be recovered from the tort feasor or her insurer, if proved with sufficient certainty."

However,

> "An uncorroborated general estimate by a plaintiff as to his loss of earnings or profits is not sufficient proof of such loss, where corroborative evidence is shown to be available and is not produced."
> Jenkins v. Audubon Insurance Co., 110 So.2d 221 (La.App.1st Cir. 1959).

profits, if any, is speculative. The proof therefore lacks the sufficient certainty required.

GENERAL DAMAGES

General damages are all those which may be awarded in a defamation case other than special, pecuniary damages. All such damages are compensatory. No punitive damages are pertinent in this case. As noted above, this court feels that Civil Code Article 2315.1 should not be given retroactive effect because this amendment worked a substantive rather than procedural or remedial change in the law.

Proper elements of general damages are mental anguish, humiliation, embarrassment and loss of reputation. Such damages are compensable even when there is no showing of special damages. Sas Jaworsky v. Padfield, 211 So.2d 122 (La. App.3rd Cir. 1968), Kennedy v. Item

Company, 34 So.2d 886 (La. 1948). The jurisprudence indicates the general notion that any slur to the reputation of the victim that would significantly injure him in the eyes of the community in any fashion is actionable.

An initial question is whether or not a corporation, like the plaintiff in this case, can suffer general damages, and if so, what type of such damages may it suffer. The courts of this State have apparently not made any distinction between a corporate plaintiff and a private plaintiff in this regard. Even though the question has never been squarely posed, it has also not been raised by a court in cases where the plaintiff was a corporation. The jurisprudence has been framed in terms of damage recoveries possible to a "victim" of defamation. Since a corporation may be a victim of defamation, it may recover all

damages necessary to compensate it for its loss as could any other victim. However, since a corporation is an artificial person, it cannot suffer mental anguish, humiliation, or embarrassment. It can suffer loss of reputation, but such loss should logically be limited to its business reputation.

Such a limitation on an award of general damages comports with the Gertz v. Robert Welch, Inc., requirement of "actual injury" in First Amendment cases where New York Times "malice" has not been shown. The BBB "Special Bulletin" comes within the guidelines of protected free speech under the First Amendment. It is not clear whether or not the jury found New York Times "malice." The court's charge was to the effect that a finding of defamation as a result of "fault" was a sufficient basis of liability, and the jury may or may not have

found "malice." However, for purposes of an award of general damages, it makes no difference whether the jury found malice or not. The evidence is sufficient to support a finding of "actual injury," since that term is defined in Gertz to include, "impairment of reputation and standing in the community," with the only other requirement being that such impairment of reputation or standing cannot be presumed in the absence of proof. (Restatement of Torts 2d, Sec. 621b).

The evidence for general damages comes from the testimony of Jesse Jarreau, Scotty Wood, and Paul A. Hayes, Jr. While not sufficiently specific to support an award of special damages, the testimony indicated a growing lack of confidence in the ability and integrity of the plaintiff corporation and its personnel which can be linked directly to the "Special Bulletin."

The final question is the amount to be awarded. The general law, as set forth in Sas Jaworsky v. Padfield, supra., and Kennedy v. Item Company, supra., is that:

> "The amount of damages to be awarded in such a case is left largely to the discretion of the courts, taking into consideration the severity of the charges, the motives of the defamer, the position of influence enjoyed by the defendant, and the extent of publicity which was given to the defamatory statement."

In fixing the award, the court has reviewed prior awards, but is guided mainly by the unique facts of this case in setting an award which is believed to be fair and reasonable. Damages are fixed at Thirty Thousand Dollars.

Judgment will be signed accordingly.

BATON ROUGE, LOUISIANA, this 31st day of January, 1978.

s/ Melvin A. Shortess
JUDGE

"APPENDIX B-4"

ECONOMY CARPETS MANUFACTURERS AND DISTRIBUTORS, INC.	*	NO. 181,734, DIV. "D"
VERSUS	*	19TH JUDICIAL DISTRICT COURT
BETTER BUSINESS BUREAU OF BATON ROUGE AREA, INC., ET AL	*	PARISH OF EAST BATON ROUGE
	*	STATE OF LOUISIANA

* * * * * * * * * * * * * * *

JUDGMENT

This matter came before the Court on the partial New Trial granted Defendants on the issue of quantum only. The parties stipulated that the quantum issue be tried by the Court on the record, without a jury. The Court, after considering the pleadings, the evidence, the argument of counsel, for Written Reasons assigned on the 31st day of January, 1978,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Plaintiff, Economy Carpets Manufacturers and Distriburors, Inc., and

against the Defendants, Better Business Bureau of Baton Rouge Area, Inc. and St. Paul Fire and Marine Insurance Company, jointly, and in solido, in the full and true sum of THIRTY THOUSAND AND NO/100 DOLLARS ($30,000.00), with legal interest thereon, from date of judicial demand, until paid, and for all costs of these proceedings.

JUDGMENT RENDERED On January 31, 1978.

JUDGMENT READ AND SIGNED on this 8th day of Februqry, 1978,at Baton Rouge, Louisiana.

s/ Melvin A. Shortess
JUDGE, 19TH JUDICIAL
DISTRICT COURT

APPENDIX "C"

SUPREME COURT OF LOUISIANA

New Orleans, 70112

ECONOMY CARPETS MANUFACTURERS & DISTRIBUTORS, INC. — September 29, 1978

VS.

BETTER BUSINESS BUREAU OF BATON ROUGE AREA, INC., AND ST. PAUL FIRE AND MARINE INSURANCE COMPANY — NO. 62,824

In re: Economy Carpets Manufacturers and Distributors, Inc., applying for Certiorari, or writ of review, to the court of Appeal First Cirsuit Parish of East Baton Rouge.

Writ denied. The result is correct.

JWS
ATJR
JAD
PFC
WFM

SUMMERS, J., would grant the writ.

DENNIS, J., is of the opinion the writ should be granted.

APPENDIX "D"

ECONOMY CARPETS MANUFACTURERS & DISTRIBUTORS, INC.	STATE OF LOUISIANA COURT OF APPEAL
VS.	
BETTER BUSINESS BUREAU OF BATON ROUGE AREA, INC., AND ST. PAUL FIRE AND MARINE INSURANCE COMPANY	FIRST CIRCUIT NUMBER 11,748

* * * * * * * * * * * * * * *

CERTIFICATE OF LOUISIANA STATE COURT OF APPEAL, FIRST CIRCUIT, AS TO EXISTENCE OF A FEDERAL QUESTION

This Court hereby certifies that in this appeal, it rendered judgment for defendants on the basis of an opinion privilege gleaned from decisions of the Supreme Court of the United States and the Supreme Court of the State of Louisiana rendered under the First Amendment to the United States Constitution. This Court further certifies that writs of certiorari were taken in this matter to the Louisiana Supreme Court and that said writs were denied and, therefore, this Court is the highest Court in the

State of Louisiana which rendered a decision and opinion in this case.

Respectfully submitted on behalf of the Louisiana Court of Appeal, First Circuit:

PAUL B. LANDRY, JR.
Presiding Judge, La. Court of Appeal, First Circuit, 222 St. Louis Street, Baton Rouge, Louisiana 70801
Phone: (504) 342-6920